

# CASES ON CONSTITUTIONAL LAW

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## PREFACE

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I have always shared the view of the late Professor McGovney, upon whose well-known collection of cases the present volume is based, that Constitutional Law is a subject that "the student can comprehend only by the reading of many cases."\* I fully recognize, of course, the importance of a knowledge of constitutional history and of pertinent socio-economic data to an adequate understanding of constitutional litigation, but I do not see how very much non-case material of this sort can be included in a case-book designed for the use of an instructor who has from forty to sixty class-room hours at his disposal without slighting the cases themselves. This I have been unwilling to do. I have, however, in the editorial notes following the reprinted cases included not only abstracts of many other cases but considerable explanatory material as well as citations to books and law review essays which have seemed to me of exceptional interest. These citations are meant to be suggestive rather than inclusive, and other instructors will doubtless have their own views as to what collateral reading is worthy of emphasis.

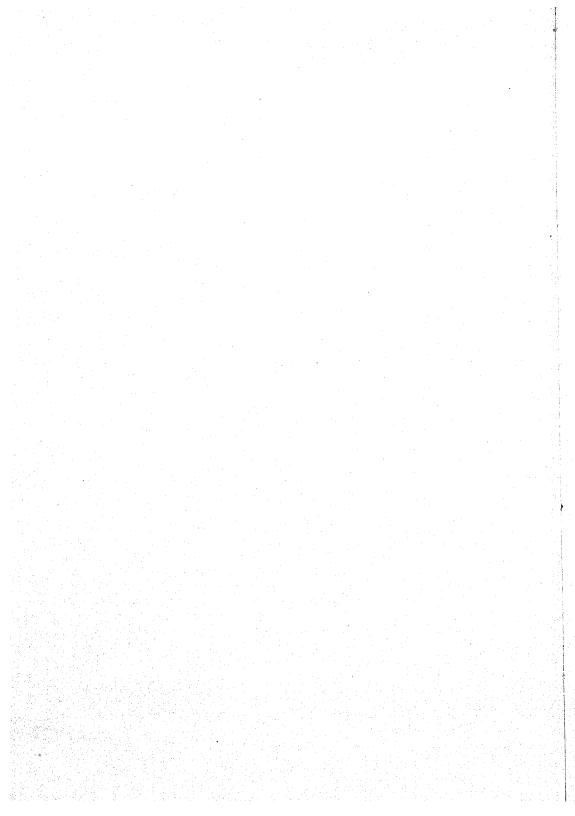
Although somewhat extensive changes have been made in Professor McGovney's original organizational scheme, this case-book, like his earlier volumes, has been constructed along "doctrinal" rather than "historical" or "chronological" lines. Because of the necessity of including many important Supreme Court opinions of recent years—particularly those dealing with the basic First Amendment guaranties—I have cut down materially the wide range of topics included in the earlier McGovney volumes. Several matters now customarily dealt with in other courses in the law curriculum have been omitted altogether. Among these are problems relating to national taxation for revenue purposes, the delegation of legislative powers and the limits of discretion in rule-making, the full faith and credit clause, and *ex post facto* legislation. Because of its importance to the practicing lawyer, additional material relating to the procedural aspects of constitutional litigation has been included in the chapter on judicial review.

Pendleton Howard

Los Angeles, California  
August 5, 1955

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\* McGovney, *Cases on Constitutional Law* (2d ed., 1935), Preface.



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# Cases on Constitutional Law

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## CHAPTER I

### THE JUDICIAL PROCESS IN CONSTITUTIONAL CASES

#### Section 1.—Establishment of the Power of Judicial Review.

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#### MARBURY v. MADISON.

Supreme Court of the United States, 1803.

1 Cranch 137, 2 L. ed. 60.

At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, Esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that enquiry, either by the secretary of state or any officer in the depart-

ment of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the fourth day of this term. \* \* \*

Afterwards, on the 24th of February the following opinion of the court was delivered by the Chief Justice.

OPINION OF THE COURT.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the County of Washington, in the District of Columbia.

No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court, is founded. \* \* \*

2dly. The power of this court.

1st. The nature of the writ. \* \* \*

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law to any courts appointed or persons holding office, under the authority of the United States."

The Secretary of State being a person holding an office under the authority of the United States is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state

shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this Court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one Supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. \* \* \*

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written Constitution—would

of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the Constitution endeavours to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these

words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ——— according to the best of my abilities and understanding, agreeably to *the Constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *Constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

The rule must be discharged.

## NOTES

1. The contemporary significance of *Marbury v. Madison* lay not so much in the assertion of power by the Supreme Court to pass upon the constitutional validity of Congressional legislation as in its announcement of the doctrine that the court might issue mandamus to a Cabinet officer who was acting by direction of the President. President Jefferson resented the court's encroachment upon the authority of the Executive much more than any alleged "judicial usurpation" of the power of Congress in the legislative field. See 1 Warren, *The Supreme Court in United States History* (1922), 232. Thirty-five years later, in *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181 (1838), an act of Congress had directed the Postmaster-General to credit a contractor with such sums as the Solicitor of the Treasury should find due to him. The court held that the crediting of this money was a ministerial duty, the performance of which might be judicially enforced.

2. Although the decision in *Marbury v. Madison* was the occasion of controversy, there was nothing novel about the doctrine that the judicial department of government is the branch which must finally determine whether a legislative act is enforceable as law under a written constitution. The reasoning of Chief Justice Marshall follows closely that of Alexander Hamilton in Numbers 78 and 80 of *The Federalist* (essays published in 1787 and 1788 expounding, and advocating the adoption by the states, of the Constitution).

In the pre-revolutionary period, colonial legislatures were subordinate bodies which were limited by the terms of colonial charters and the laws of England. Appeals from the colonial courts to the Privy Council in England frequently involved alleged conflicts between legislative enactments and colonial charters. While the policy or expediency of the statute was sometimes under attack, the chief ground for disallowance was the asserted lack of authority of the colonial

legislature to enact the measure. A notable case was *Winthrop v. Lechemere* (1727-28), where a statute of Connecticut was held "null and void and of no force or effect whatever" since it was "not warranted by the Charter" of that colony. See Thayer, *Cases on Constitutional Law* (1895), I, 34; McGovney, *The British Origin of Judicial Review of Legislation*, 93 U. of Pa. L. Rev. 1 (1944).

In the post-revolutionary period, state constitutions were substituted for colonial charters and it was well-understood that state legislatures were bound thereby. It also seems to have been generally accepted that a state court might pass upon the issue of the alleged repugnance of a state statute to the state constitution. Eight precedents or possible precedents have been discussed by constitutional historians where state laws were held invalid by state courts prior to the adoption of the Constitution of the United States in 1789. There were also a number of similar precedents between 1789 and the decision in *Marbury v. Madison*. Consult Thayer, *Cases on Constitutional Law* (1895), I, 48-80; Coxe, *Judicial Power and Unconstitutional Legislation* (1893), 219-270; Corwin, *The Doctrine of Judicial Review* (1914), 71-74; Haines, *The American Doctrine of Judicial Supremacy* (2d ed. 1932), chs. V, VII.

While the Constitution contains no specific reference to the power of judicial review, the debates in the Constitutional Convention indicate that the delegates expected the new courts to be established under the authority of the federal government to pass upon the constitutionality of acts of Congress. They knew that their state courts had successfully asserted the power of enforcing the state constitutions, without any specific provisions in those constitutions for such action. It is probable that they made no express provision for the exercise of the power of judicial review because they made no express provision for the exercise of any other power by the federal courts. They created the Supreme Court and defined its *jurisdiction* (i. e., the subject matter over which its judicial power should extend), but they made no attempt to control its judicial functions after it had obtained jurisdiction. See Warren, *Congress, the Constitution and the Supreme Court* (rev. ed. 1935), ch. 2; Beard, *The Supreme Court and the Constitution* (1912).

Alexander Hamilton doubtless expressed the view generally accepted by the framers of the Constitution when he wrote in No. 78 of *The Federalist*:

The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

*Marbury v. Madison* was not the first case in which the Supreme Court passed upon the constitutionality of an act of Congress but it was the first in which the court held an act of Congress unconstitutional. On a fictitiously framed issue constituting virtually a moot case the court in 1796 held a law of Congress valid. In his opinion in this case Associate Justice Chase said that since he considered the statute consistent with the Constitution "it is unnecessary, at this time, for me to determine, whether this Court, constitutionally possesses the power to declare an act of Congress *void*, on the ground of its being made contrary to, and in violation of, the Constitution; but if the Court have such power, I am free to declare, that I will never exercise it, but in a *very clear case*." (Italics are in the original report.) *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556 (1796), and see 1 Warren, *The Supreme Court in United States History* (1922), 146-149. Moreover, several of the individual justices of

the court, sitting on circuit, had on a previous occasion declared an act of Congress unconstitutional. The statute involved was one which imposed on justices of the Supreme Court the duty of examining and passing on the claims of invalid Revolutionary soldiers. The views of these members of the Court are set forth in correspondence included in the report of Hayburn's Case, 2 Dall. 409, 1 L. ed. 436 (1792).

3. The principle of the supremacy of Parliament is well-established in English constitutional law. The doctrine of judicial review of legislative acts has no application to a legislature whose powers are unlimited and finds virtually no support in the English precedents. Of historical interest only is the celebrated dictum in *Dr. Bonham's Case*, 8 Co. 181a (1610), where Chief Justice Coke said:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.

4. In *Blodgett v. Holden*, 275 U. S. 142, 147-148, 72 L. ed. 206, 210, 48 Sup. Ct. 105 (1928) Mr. Justice Holmes said: "Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this, among other considerations, the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same."

Had Chief Justice Marshall not deemed the time propitious for asserting the Supreme Court's power to nullify an act of Congress, it would not have been difficult for him to reconcile the section of the Judiciary Act of 1789 held invalid by the decision with Article III of the Constitution by applying the canon of constitutional interpretation set forth above by Mr. Justice Holmes. In other words, he could have solved the problem by dealing with it as a matter of statutory construction and thus avoided the necessity of holding the statute unconstitutional. The section could reasonably have been held to mean that the Supreme Court had power to issue writs of mandamus on occasions when that remedy was appropriate in the disposition of those cases which, in conformity with Article III, were properly before the court. The power of the court in this regard is now set out in the Judicial Code [28 U. S. C. § 1651(a); F. C. A. 28 § 1651(a)] as follows: "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." For discussions of this aspect of the case see Corwin, *The Doctrine of Judicial Review* (1914), 9; Fairman, *American Constitutional Decisions* (1948), 24-25.

5. In our federal structure of government there are three situations in which courts may be called upon to pass upon the constitutional validity of legislative acts: (1) where an act of Congress is alleged to violate the Constitution of the United States; (2) where the law of a state is alleged to violate the Constitution of the United States; and (3) where the law of a state is alleged to violate the state's constitution. In general, federal courts have the power to decide questions of state constitutional law, and state courts have the power to decide questions of federal constitutional law, if the determination of such constitutional issues is necessary to the disposition of cases brought before them. But state courts are bound by the decisions of federal courts on questions of federal constitutional law, and the decision of a state's court of last resort is final as regards a question of the constitutional law of that state.

6. For interesting accounts of *Marbury v. Madison* see 1 Warren, *The Supreme Court in United States History* (1922), ch. 5, and 3 Beveridge, *The Life of John Marshall* (1919), ch. 3. On the history of the doctrine of judicial review consult: Corwin, *The Doctrine of Judicial Review* (1914); McLaughlin, *The Courts, the Constitution and Parties* (1912); Dougherty, *Power of Federal Judiciary over Legislation* (1912); Coxe, *Judicial Power and Unconstitutional Legislation* (1893); Haines, *The American Doctrine of Judicial Supremacy* (2d ed. 1932); Warren, *Congress, the Constitution and the Supreme Court* (rev. ed. 1935); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893); 1 *Selected Essays on Constitutional Law* (1938), 503, also reprinted in Thayer, *Legal Essays* (1908), 1. For a vigorous condemnation of the assumption by courts of the power of judicial review, see Trickett, *The Great Usurpation*, 40 *Am. L. Rev.* 356 (1906).

7. Down to 1936 there were 76 cases in which the Supreme Court of the United States held an act of Congress or some portion thereof to be unconstitutional, out of more than 40,000 cases decided; 64 different acts were construed and 84 provisions of law in some respect invalidated. See the study prepared by the Legislative Reference Service of the Library of Congress: *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States*, Government Printing Office (1936). Only two laws of Congress have been held invalid since 1936. While the number of laws declared unconstitutional as compared with the total number of laws passed is indeed negligible, it is none the less true that the court's exercise of the judicial veto has at times been productive of serious political repercussions. Decisions holding invalid acts of state lawmaking bodies have been responsible for some of the adverse criticism. President Franklin D. Roosevelt's proposed bill in 1937 for reorganization of the federal judiciary, following the invalidation of important Congressional enactments of the New Deal administration, was only the last of numerous occasions in our constitutional history in which dissatisfaction with the court's decisions on constitutional issues has resulted in proposals to abrogate or curb the exercise of judicial review. For informative discussions see: Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 *Ind. L. J.* 386, 474 (1929); Fite and Rubenstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 *Mich. L. Rev.* 762 (1937); McGovney, *Reorganization of the Supreme Court*, 25 *Cal. L. Rev.* 389 (1937). The story of the 1937 court fight is told from the administration standpoint in Jackson, *The Struggle for Judicial Supremacy* (1941).

### MARTIN v. HUNTER'S LESSEE.

Supreme Court of the United States, 1816.

1 Wheat. 304, 4 L. ed. 97.

[This case originated in an action of ejectment in a state district court in Virginia. The original defendant, an alien British subject, claimed that his title was protected by the treaty with England of 1783; the plaintiff, that by Virginia legislation the land had vested in that State and had been granted to him. The trial court gave judgment for the defendant in 1794. An appeal was revived against Martin an heir at law and devisee of Denny Fairfax and in 1810 the Court of Appeals of Virginia reversed the decision. On writ of error to the United States Supreme Court, that court, taking jurisdiction because of the right set up under the treaty and denied by the Court of Appeals,

in 1813 reversed the decision of the latter court (7 Cranch 603, sub. nom. Fairfax's Devisee v. Hunter's Lessee) and remanded the case to that court "with instructions to enter judgment for the appellant Philip Martin." The mandate of the Supreme Court, using the customary language, "commanded" the Court of Appeals to take proceedings "agreeably to said judgment and instructions of said Supreme Court." The Court of Appeals requested argument of counsel whether the mandate should be obeyed and after six days argument and twenty months consideration announced in December, 1815, the judgment stated below, reported in 4 Munf. (Va.) 1.]

MR. JUSTICE STORY delivered the opinion of the Court.

This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February Term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the Act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were coram non iudice, in relation to this court, and that obedience to its mandate be declined by the court." \* \* \*

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar. \* \* \*

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interest should require. \* \* \*

The third article of the Constitution is that which must principally attract our attention. \* \* \*

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to *all cases*," &c., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the Constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some*, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have

no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus foederis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any Act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances, it must be held that the appellate power would extend to state courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution, or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the Constitution, laws and treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The Constitution of the United States has declared that no state shall make anything but gold or silver coin a tender in payment of debts, or pass

a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution. \* \* \*

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power a restriction which is not to be found in the terms in

which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior or [the] appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter. \* \* \*

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the

Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. \* \* \*

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language [an exercise of original jurisdiction]; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts, the right of removal, which is but

a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the state decisions would be paramount to the Constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one. \* \* \*

It is the opinion of the whole court, that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby affirmed. [The concurring opinion of Mr. JUSTICE JOHNSON is omitted.]

#### NOTES

1. The text of section 25 of the Judiciary Act of 1789, discussed in the opinion, is as follows:

SECTION 25. A final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty,

statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

2. Note that the section specifies three principal fact situations which were deemed certain to arise in future cases: (1) Where the validity of a federal statute or treaty is involved and the decision of the state court is *against* its validity; (2) Where the validity of a state statute is drawn in question as repugnant to the federal Constitution, statutes or treaties and the decision of the state court is *in favor* of its validity; and (3) Where the construction of any clause of the federal Constitution, or of a federal statute or treaty, is drawn in question and the decision of the state court is *against* the title, right, interest or privilege claimed thereunder by either party. In all these situations, the section provides, the decision of the state court can be re-examined and reversed or affirmed by the Supreme Court of the United States on writ of error.

The present form of section 25 of the Judiciary Act of 1789 appears in the following provision of the Judicial Code (28 U. S. C. § 1257; F. C. A. 28 § 1257):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In paragraphs (1) and (2) above the term "writ of error," originally used, has (since 1928) been changed to "appeal," but the change is unimportant. In paragraph (3) the Supreme Court is empowered to require a case to be certified to it for final decision from the highest state court, even though the decision of that court is *in favor* of the federal right or immunity. It was not until 1914 that the Supreme Court was vested with this discretionary appellate jurisdiction to determine finally the meaning of the Constitution of the United States for all the states and territories of the nation. Before that time state courts were the final interpreters, within their own borders, of the Constitution,

so long as they decided the claim in favor of the national authority. Amplifying paragraph (3) above, the Supreme Court in its Revised Rules has said (Rule 19, par. 1) that "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." It is to be noted that the certiorari jurisdiction includes *all* the cases, so that those listed in paragraphs (1) and (2) may go to the Supreme Court either way. The Judicial Code provides (28 U. S. C. § 2103; F. C. A. 28 § 2103) that if a party takes an appeal where there is only certiorari jurisdiction, the appeal papers will be considered as a petition for certiorari and acted on as such. Obviously, however, if a party seeking review has a right to an appeal, under either paragraphs (1) or (2), he had better go that way, since the certiorari jurisdiction is discretionary with the Supreme Court. For an excellent short discussion of the appellate jurisdiction of the Supreme Court over state courts, see Bunn, *A Brief Survey of the Jurisdiction and Practice of the Courts of the United States* (5th ed. 1949), 237-253.

3. Is Justice Story correct in saying that the power of removal before trial or judgment is an exercise of *appellate* jurisdiction? On this point note the language of Mr. Justice Field, speaking for the court in *Railway Co. v. Whitton's Admr.*, 13 Wall. 270, 287, 20 L. ed. 571 (1871): "We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the federal court acquires original jurisdiction of the causes. But it is not material whether the reasoning of the distinguished jurist [Justice Story] in this particular is correct or otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the Judiciary Act of 1789."

4. In *Gordon v. United States*, 117 U. S. 697 (appendix) 700, 76 L. ed. 1347 (1865) Mr. Chief Justice Taney said: "The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, an absolute necessity, in order to preserve internal tranquility, that there should be some tribunal to decide between the government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers and duties are defined in the Constitution, and its independence of the legislative branch of the government secured. \* \* \* To the same effect is Mr. Justice Holmes' much quoted assertion: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states." Holmes, *Collected Legal Papers* (1921), 295.

5. In order to avoid the possibility of further friction with the Virginia Court of Appeals, the Supreme Court, instead of issuing a second mandate to that court, issued its process directly to the state District Court in which the suit had been originally instituted. 1 Warren, *The Supreme Court in United States History* (1922), 450. In two other cases similar action was taken, owing to the failure of the highest tribunal of the state to comply with a mandate: *Tyler v. Magwire*, 17 Wall. 253, 21 L. ed. 576 (1873) and *Williams v. Bruffy*, 102 U. S. 248, 26 L. ed. 135 (1880). Generally, state courts have

complied with Supreme Court mandates; see, however, Note, State Court Evasion of United States Supreme Court Mandates, 56 Yale L. J. 574 (1947).

6. Interesting sidelights on the principal case are given in 1 Warren, The Supreme Court in United States History (1922), 442-453 and 4 Beveridge, The Life of John Marshall (1919), 144 *et seq.* Since it sustained the constitutionality of section 25 of the Judiciary Act of 1789 and established the appellate jurisdiction of the Supreme Court to review the judgments of state courts where questions involving the Constitution, laws and treaties of the United States have been finally decided by those courts and the federal right denied, Mr. Justice Story's opinion has been aptly characterized by Warren as "the keystone of the whole arch of federal judicial power."

7. In *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257 (1821), decided five years after *Martin v. Hunter's Lessee*, the constitutionality of section 25 of the Judiciary Act was again sustained. Cohens was prosecuted by the State of Virginia for selling a lottery ticket in Virginia contrary to a state statute which forbade sale within its limits of lottery tickets other than in lotteries authorized by the State. Cohens pleaded that the ticket sold by him was one in "the national lottery" conducted by the City of Washington under a power given to it by act of Congress. The prosecution contended (1) that the jurisdiction of the court was excluded by the character of the parties, since the State was a party defendant on the writ of error and the suit was thus in effect a suit against a state, prohibited by the Eleventh Amendment to the Constitution; (2) that the court's appellate jurisdiction did not extend to the judgment of a state court; and (3) that the act of Congress, if construed to authorize the sale of lottery tickets in a state whose law forbade such sale, exceeded the power of Congress under the Constitution and therefore no law of the United States had been violated by the judgment.

Speaking for the court, Chief Justice Marshall denied the contention that the suit was one against a state and held that upon these issues there was a case "arising under" the Constitution of the United States, and that therefore it was within the appellate jurisdiction of the Supreme Court to review the judgment of conviction against Cohens rendered by the state court. "A case in law or equity," said Marshall, "consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." On the question as to whether the appeal constituted a suit against a state, Marshall said that "the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question, whether that judgment be a violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing which he demands."

Having sustained the court's jurisdiction on the writ of error, Marshall decided the case on the merits in favor of the State, holding that Congress did not intend to authorize the sale of the lottery tickets in Virginia, even if it had the power to do so.

This decision, supplementing that in *Martin v. Hunter's Lessee*, firmly established the Supreme Court of the United States as the final arbiter in all justiciable questions of constitutionality relative to the Constitution of the United States. The case caused much public discussion and subjected the Court to vigorous attack. See 2 Warren, The Supreme Court in United States History (1922), 7-24; 4 Beveridge, The Life of John Marshall (1919), 340-370.

## FLETCHER v. PECK.

Supreme Court of the United States, 1810.

6 Cranch 87, 3 L. ed. 162.

ERROR to the Circuit Court of the United States for the District of Massachusetts, in an action of covenant brought by Fletcher against Peck. \* \* \*

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.  
\* \* \*

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the legislature of the State of Georgia, at the time of passing the Act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said Act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting Act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. \* \* \*

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the Act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c. and so the title of the State of Georgia did not pass to the said Peck, &c. \* \* \*

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? \* \* \*

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act

is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The Circuit Court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the State of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The court proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void. \* \* \* [The Court held that this rescinding Act could not operate (at least not against Peck, who was a purchaser for value without notice of the fraud practiced in procuring the original grant), without violating the prohibition of the United States Constitution that, "no state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts," Article I, Section 10. That it is the function of a federal court to refuse effect to a state statute in these circumstances is not reasoned about unless it be in the following passages:] She [Georgia] is a part of a large empire; she is a member of the American union; and that union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. \* \* \*

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. \* \* \*

[The reasons for holding that the rescinding act conflicted with Article I, Section 10, are considered in a later chapter.]

## NOTES

1. *Fletcher v. Peck* was the first case in which the Supreme Court held the law of a state to be unconstitutional, although inferior federal courts had previously done so. While the suit involved legislation which had been the subject of bitter controversy and violent attack for more than fifteen years in the State of Georgia and in the Congress, it is to be noted that the State itself made no attack on the statute but that it was invalidated in a private action by one individual against another. For the great contemporary significance of the decision, see 1 Warren, *The Supreme Court in United States History* (1922), 392-399; 3 Beveridge, *The Life of John Marshall* (1919), ch. 10. Warren points out that the decision "fell with a stunning shock upon the State-Rights politicians and enhanced their hostility towards the judicial power" but thinks that "if the Court had acceded to the contention that a state statute could be invalidated by a Federal tribunal, on allegations of fraud or bribery in its passage, a wide door would have been opened for the attack upon State legislation in countless instances in subsequent years."

2. The student should consider the phenomenon of an inferior federal court or the Supreme Court passing upon the validity of a state statute relative to the state's Constitution. (That issue alone will not give a federal court jurisdiction, but it may have jurisdiction of the case because of the character of the parties or because there is a "federal question" in the case.) It is assumed in the principal case that even without express grant it is a function of every court in all circumstances to refuse application to a statute in conflict with a constitution under which it is enacted? Compare with this part of the principal case those which have come to the Supreme Court through writs of error, appeal or certiorari to judgments of state courts of last resort where, for instance, the validity of a statute has been put in issue on a claim that it violated both state and national Constitutions. If the state court of last resort has held that the statute does not violate the state Constitution, the Supreme Court of the United States will not consider that question.

Does it help to say that in several situations a federal court is substituted in the place of a state court to decide an issue in which the law of a state is the whole or a part of the law of the case? Suppose the law of New York is the proper law in a case pending in an English court and a New York statute is proved applicable but challenged by the contention that it conflicts either with the Constitution of New York or that of the United States, though no American court has yet passed on that question. Will the English court consider it?

3. There is some doubt as to the adversary character of *Fletcher v. Peck*. In his separate opinion Mr. Justice Johnson said: "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples in the belief that they would never consent to impose a mere feigned case upon this court."

## PEOPLE v. WESTERN UNION TELEGRAPH CO.

Supreme Court of Colorado, 1921.

70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326.

In this cause an information was filed in the trial court against the defendants, charging them with a violation of chapter 5, Session Laws

of 1911, known as "The Anti-Coercion Act," in that as a condition to the continued employment of one Holson they required of him a contract that he sever his connection with the Commercial Telegraphers' Union of America, and upon his refusal to comply, discharge him. To this information defendants demurred on the ground that "the Anti-Coercion Act" was unconstitutional under the Bill of Rights of the State of Colorado and the Fourteenth Amendment to the federal Constitution. To the consideration of this issue the people objected on the ground that such consideration was prohibited by amended sec. 1, art. VI, of the state Constitution.

The objection was overruled, "the Anti-Coercion Act" held in conflict with the federal Constitution, and final judgment entered discharging defendants and releasing their bondsmen. To review that judgment the people bring this cause here. \* \* \*

BURKE, J., after stating the facts as above.

Three questions are here presented: The right of the trial court to hear and determine the federal constitutional question; the correctness of its judgment; and the date when our decision becomes effective.  
\* \* \*

That this [Anti-Coercion] act is a plain violation of the federal Constitution has been clearly determined by the Supreme Court of the United States. *Coppage v. Kansas*, 236 U. S. 1. In that case a decision of the supreme court of Kansas was reversed, and a statute of that state, in all material particulars identical with the one here under consideration, was declared a violation of the "due process" clause of the United States Constitution. Having determined that this cause was correctly decided below, it may be said that the constitutionality of the "Anti-Coercion Act" has now, at least, been passed upon by a court having jurisdiction, and it is therefore unnecessary to consider the objection of the people to the hearing on the demurrer. If so the same situation would be presented had we held the act constitutional. Since the passage of the amendment to sec. 1, art. VI, we have assumed the correctness of that rule. However, there has arisen such a disparity of opinion in our trial courts concerning their power to determine constitutional questions, and such a resulting confusion among members of the bar concerning the practice, that it now becomes our imperative duty, under sec. 2, art. VI, of our state Constitution, which vests in the supreme court "a general superintending control over all inferior courts," to construe sec. 1, art. VI, with reference to the power of such courts where federal constitutional questions are involved.

The jurisdiction of the district court in the premises, prior to January 22, 1913, is undisputed, and is too well settled in this country to admit of argument or require the citation of authority. On that date (if ever) said section 1 became effective. It specifies the courts in which the judicial power of the state shall be vested, and then provides:

"None of said courts except the Supreme Court shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto adopted by the people in cities acting under Article XX hereof as in violation of the constitution of this state or of the United States." \* \* \* ["Provided that before such decision [of the Supreme Court] shall be binding it shall be subject to approval or disapproval by the people. \* \* \* All such laws or parts thereof submitted as herein provided when approved by a majority of the votes cast thereon at such election shall be and become the law of this state notwithstanding the decision of the Supreme Court." So likewise any city or county charter or amendment thereto held invalid by the Supreme Court was to be submitted to the voters of such city or county and if approved by a majority of the voters it was to be valid notwithstanding the decision of the Supreme Court.]

Paragraph 2, art. VI, of the Constitution of the United States provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." \* \* \*

It is said that, notwithstanding the provision of the federal Constitution, above cited, the trial judge was precluded by amended sec. 1 of article VI of the state Constitution from passing upon the question raised by the demurrer. The answer is that the trial judge was bound by the mandate of the federal Constitution to apply that instrument upon all proper occasions and to hold it to be the supreme law of the land "anything in the constitution or laws of any state to the contrary notwithstanding." It is said that the judge's oath to support the Constitution of Colorado bound him to give effect to that clause thereof prohibiting him from declaring a legislative act contrary to the federal Constitution. The answer is that any section of the state constitution which is contrary to the federal Constitution is, for that reason and to that extent, null and void. It is no part of the state constitution, and no legerdemain of logic can cover it with the sanctity of a judge's oath.

The reasoning of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, is as applicable to a state constitutional provision which violates the federal Constitution as it is to a federal statute which violates that instrument; and his reasoning from the standpoint of the judicial oath as unanswerable here as there. It follows that the trial court in the instant case had the right, and it was its bounden duty, to determine the federal constitutional question raised by the demurrer.

\* \* \*

There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in its people to command their courts to

do so. That issue was finally settled at Appomattox. When a federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away nor that duty abrogated by the state of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the Constitution of the state of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions. The question may be brought by writ of error to this court for review, and from our judgment the cause may be taken for final determination to the Supreme Court of the United States itself. It cannot be reviewed by popular vote of the citizens of Colorado, or one of its municipalities, and any pretended constitutional provision of this state, assuming to provide such method of review is null and void. \* \* \*

It is to be observed that the validity of said amended sec. 1, art. VI, so far as it prohibits trial courts from holding statutes and city charters to be in violation of the state Constitution, and assumes to provide a method of recalling decisions of the supreme court so holding, is not herein determined. \* \* \* The judgment is accordingly affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

#### NOTES

1. In *People v. Max*, 70 Colo. 100, 198 Pac. 150 (1921), decided the same day, the Supreme Court of Colorado held that the amendments to the state Constitution considered in the principal case were void also in their attempt to take away the previous power of state trial courts to pass upon the validity of state statutes relative to the state Constitution.

2. States have sometimes attempted to regulate the exercise of judicial review by their own courts by constitutional provisions requiring an extraordinary majority of the judges to agree on the unconstitutionality of a statute in order to invalidate it. In *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, 74 L. ed. 710, 50 Sup. Ct. 228, 66 A. L. R. 1460 (1930) the Supreme Court of the United States held that no provision of the federal Constitution prevented a state from making such an experiment. But Chief Justice Hughes pointed out that Congress had made appropriate provision for the hearing and determination by the Supreme Court of any case where a question of federal right had been passed upon by the highest court of the state in which a decision could be had. He said that "it is not for this Court to intervene to protect the citizens of the state from the consequences of its policy, if the state has not disregarded the requirements of the federal Constitution." Cf. *De Witt v. State ex rel. Crabbe*, 108 Ohio St. 513, 141 N. E. 551 (1923), and *Wilson v. Fargo*, 48 N. Dak. 447, 186 N. W. 263 (1921). See also, Note, 18 Cal. L. Rev. 439 (1930).

3. State law and practice govern the jurisdiction of state courts to pass upon and determine issues of federal right. In *Central Union Telephone Co. v. Edwardsville*, 269 U. S. 190, 70 L. ed. 229, 46 Sup. Ct. 90 (1925) Chief Justice Taft took occasion to reaffirm the court's statement in an earlier case: "Without any doubt it rests with each State to prescribe the jurisdiction of its

appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

4. The Emergency Price Control Act of 1942, 50 U. S. C. App. Supp. II, § 901 *et seq.*, F. C. A. 50 Appx. § 901 *et seq.*, limited judicial review of the constitutionality of any provision of the Act or of any order of the Administrator thereunder to a federal Emergency Court of Appeals and to the Supreme Court of the United States, but vested in state courts concurrent jurisdiction in civil enforcement suits brought by the Administrator. In sustaining the statute, the Supreme Court, in *Bowles v. Willingham*, 321 U. S. 503, 88 L. ed. 892, 64 Sup. Ct. 641 (1944), pointed out that the controversy arose under the Constitution and laws of the United States and that the authority of Congress (under Art. III, § 2 of the Constitution) to withhold all jurisdiction from state courts, if it saw fit, obviously included the power to restrict the occasions when that jurisdiction might be exercised.

5. It should be noted in passing that *Coppage v. Kansas*, the decision of the Supreme Court of the United States relied upon by the Supreme Court of Colorado in the principal case to support its view that the Colorado Anti-Coercion Act (a statute outlawing so-called "yellow dog" employment contracts) violated the federal Constitution, is no longer followed by the Supreme Court of the United States. Such a statute would now be held valid under the federal Constitution. *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 85 L. ed. 1271, 61 Sup. Ct. 845, 133 A. L. R. 1217 (1941); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 93 L. ed. 212, 69 Sup. Ct. 251, 6 A. L. R. (2d) 473 (1949).

## Section 2.—When, How and by Whom the Power May be Invoked.

### EX PARTE McCARDLE.

Supreme Court of the United States, 1869.

7 Wall. 506, 19 L. ed. 264.

Appeal from the Circuit Court for the Southern District of Mississippi.

The case was this: The Constitution of the United States [Article III] ordains as follows:

"§ 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

"§ 2. The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States," &c.

And in these last cases the Constitution ordains that,

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

With these constitutional provisions in existence, Congress, on the 5th of February, 1867, by "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,"

provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and from the judgment of the said Circuit Court to the Supreme Court of the United States.

This statute being in force, one McCardle, alleging unlawful restraint by military force, preferred a petition in the court below, for the writ of habeas corpus.

The writ was issued, and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libellous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

Upon the hearing, the petitioner was remanded to the military custody; but, upon his prayer, an appeal was allowed him to this Court, and upon filing the usual appeal-bond, for costs, he was admitted to bail upon recognizance, with sureties, conditioned for his future appearance in the Circuit Court, to abide by and perform the final judgment of this Court. The appeal was taken under the above-mentioned act of February 5, 1867.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied. *Ex parte McCardle*, 6 Wall. 318.

Subsequently, on the 2d, 3d, 4th, and 9th March, the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress, returned with objections by the President, and, on the 27th of March, repassed by the constitutional majority, the second section of which was as follows:

"And be it further enacted, That so much of the act approved February 5, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed." \* \* \*

MR. CHIEF JUSTICE CHASE delivered the opinion of the Court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of Feb-

ruary, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this Court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this Court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this Court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitation of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. The United States*, 6 Cranch 312, particularly, the whole matter was carefully examined, and the Court held, that while "the appellate powers of this Court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The Court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the Court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this Court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the Court cannot

proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.

On the other hand, the general rule, supported by the best elementary writers, is, that "when an act of the legislature is repealed it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this Court. The subject was fully considered in *Norris v. Crocker*, 13 How. 429, and more recently in *Insurance Company v. Ritchie*, 5 Wall. 541. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

It is quite clear, therefore, that this Court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the Court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

The appeal of the petitioner in this case must be

Dismissed for want of jurisdiction.

#### NOTES

1. The Constitution (Art. III, § 2, cl. 2) provides: "In all cases affecting ambassadors, other public ministers and consuls and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Thus, the appellate jurisdiction of the Supreme Court is subject to the regulatory control of Congress and may be cut down or even abolished altogether, as the principal case recognizes. But the court's *original* jurisdiction, being conferred directly by the Constitution, does not depend on any statute of Congress and may not be enlarged (*Marbury v. Madison*) or diminished by legislation. However, it is not *exclusive*; that is, Congress may vest original concurrent jurisdiction in other federal courts to hear and determine cases of the type mentioned in the Constitution, and to a limited extent has done so. See Bunn, *A Brief Survey of the Jurisdiction and*

Practice of the Courts of the United States (5th ed. 1949), 219-225; Martig, Congress and the Appellate Jurisdiction of the Supreme Court, 34 Mich. L. Rev. 650 (1936); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

2. The Judicial Code (28 U. S. C. §§ 1252, 1253; F. C. A. 28 §§ 1252, 1253) provides for direct appeals to the Supreme Court from the decisions of federal district courts which invalidate acts of Congress, or which grant or deny interlocutory or permanent injunctions in proceedings required to be heard and determined by district courts of three judges. Note also section 1254, providing for review in the Supreme Court of cases in the courts of appeals (1) by certiorari, upon the petition of any party in a civil or criminal case, before or after rendition of judgment; (2) by appeal where a state statute relied on is held invalid as repugnant to the federal Constitution, treaties or laws; and (3) by certification by a court of appeals of questions of law in any civil or criminal case, where such instructions are desired.

### WHITNEY v. CALIFORNIA.

Supreme Court of the United States, 1927.  
274 U. S. 357, 71 L. ed. 1095, 47 Sup. Ct. 641.

MR. JUSTICE SANFORD delivered the opinion of the Court.

By a criminal information filed in the superior court of Alameda county, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that state. Statutes 1919, chap. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. 57 Cal. App. 449, 207 Pac. 698. Her petition to have the case heard by the Supreme Court was denied. *Id.* 453. And the case was brought here on a writ of error which was allowed by the presiding justice of the Court of Appeal, the highest court of the state in which a decision could be had. Judicial Code, § 237.

On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. 269 U. S. 530. Thereafter, a petition for rehearing was granted (269 U. S. 538), and the case was again heard and reargued both as to the jurisdiction and the merits. \* \* \*

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Crowell v. Randell*, 10 Pet. 368, 392; *Railroad Co. v. Rock*, 4 Wall. 177, 180; *California Powder Works v. Davis*, 151 U. S. 389, 393; *Cincinnati, etc., Railway v. Slade*, 216 U. S. 78, 83; *Hiawassee Power Co. v. Carolina-Tenn. Co.*, 252 U. S. 341, 343; *New York v. Kleinert*, 268 U. S. 646, 650.

Here the record does not show that the defendant raised or that the State courts considered or decided any federal question whatever, excepting as appears in an order made and entered by the Court of

Appeal after it had decided the case and the writ of error had issued and been returned to this Court. A certified copy of that order, brought here as an addition to the record, shows that it was made and entered pursuant to a stipulation of the parties, approved by the court, and that it contains the following statement:

"The question whether the California Criminal Syndicalism Act \* \* \* and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

In *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 182, where it appeared that a federal question had been presented in a petition in error to the State Supreme Court in a case in which the judgment was affirmed without opinion, it was held that the certificate of that court to the effect that it had considered and necessarily decided this question, was sufficient to show its existence. And see *Marvin v. Trout*, 199 U. S. 212, 217, et seq.; *Consolidated Turnpike v. Norfolk, etc., Railway*, 228 U. S. 596, 599.

So—while the unusual course here taken to show that federal questions were raised and decided below is not to be commended—we shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered. \* \* \*

And here, since it appears from the statement in the order of the Court of Appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, was considered and passed upon by that court—this being a Federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside.

We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other Federal question was presented in and either expressly or necessarily decided by that court. *National Bank v. Commonwealth*, 9 Wall. 353, 363; *Edwards v. Elliott*, 21 Wall. 532, 557; *Dewey v. Des Moines*, 173 U. S. 193, 200; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 633; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248; *Haire v. Rice*, 204 U. S. 291, 301; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 126; *Missouri Pacific Railway v. Coal Co.*, 256 U. S. 134, 135. It is not enough that

there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Dewey v. Des Moines*, supra, 199; *Keokuk & Hamilton Bridge Co. v. Illinois*, supra, 634. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 660; *Capital City Dairy Co. v. Ohio*, supra, 248; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 134; *Bass, etc., Ltd. v. Tax Commission*, 266 U. S. 271, 283. \* \* \*

[The Court found no repugnancy in the Syndicalism Act, as applied in the case, to either the due process or equal protection clauses of the Fourteenth Amendment and affirmed the judgment of the district court of appeal.]

#### NOTES

1. Jurisdiction of the Supreme Court of the United States to review decisions of state courts, under 28 U. S. C. § 1257; F. C. A. 28 § 1257, depends wholly on the character of the case (*i. e.*, the presence of a federal question) and the reasons for the judgment of the state court (*i. e.*, the highest court of the state in which a decision could be had). Neither citizenship of the parties nor the amount involved is material. As previously noted, the Supreme Court may not review a state decision on a question of state law. The decision of a state's court of last resort is final as regards a question of the law of that state.

Also, under § 1257, the Supreme Court has jurisdiction to review a state decision only if the federal question asserted as the basis for review was "specially set up or claimed," or "drawn in question." The record must reveal that the federal question was present in the case in the state court, and was presented to the state court for its determination. The opinion in *Whitney v. California* brings out this requirement clearly. A good recent discussion of the statutory provision is in *Wilson v. Cook*, 327 U. S. 474, 480, 90 L. ed. 793, 66 Sup. Ct. 663 (1946), where Mr. Chief Justice Stone said: "The purpose of this requirement is to restrict our mandatory jurisdiction on appeal \* \* \* and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, \* \* \* or, when the statute as applied, is so assailed, until it has opportunity authoritatively to construe it. \* \* \* This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state, \* \* \* or has in fact been decided by it, \* \* \* and that its decision was necessary to the judgment. \* \* \*"

A recent case in which the rule under discussion was apparently departed from is *Terminiello v. Chicago*, 337 U. S. 1, 93 L. ed. 1131, 69 Sup. Ct. 894 (1949), where there were four dissents on the point. "For the first time in the course of the 130 years in which State prosecutions have come here for review," said Mr. Justice Frankfurter in dissent, "this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here

nor below and that was explicitly disclaimed on behalf of the petitioner at the bar of this Court."

2. The Judicial Code (28 U. S. C. § 2103; F. C. A. § 2103) provides that if a party takes an appeal where there is only certiorari jurisdiction, the appeal papers are to be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. In *Charleston Federal Savings & Loan Association v. Alderson*, 324 U. S. 182, 89 L. ed. 857, 65 Sup. Ct. 624 (1945), which came to the Supreme Court on appeal from the Supreme Court of Appeals of West Virginia, appellants had attacked a tax assessment in the state courts as in violation of the State Constitution and the Fourteenth Amendment to the federal Constitution. In the state county court appellants had not drawn in question the validity of any statute but had alleged only that the assessment contravened the Fourteenth Amendment. In their petition for appeal to the Supreme Court of Appeals of West Virginia appellants had contended only that the assessment denied to them the equal protection of the laws in violation of the Fourteenth Amendment. In an opinion by Mr. Chief Justice Stone, the Supreme Court dismissed the appeal, but, treating the papers on which the appeal had been allowed as a petition for certiorari, granted that writ and decided the case on its merits, since appellants had properly raised the federal question as to the validity of the assessment under the Fourteenth Amendment. The court pointed out that while the opinion of the West Virginia Supreme Court of Appeals intimated that appellants' objection was made to the administration of the statute, it nowhere indicated that they contended that, as applied, the statute was invalid as repugnant to the federal Constitution. And in their assignment of errors in the Supreme Court of the United States, appellants again failed to attack the statute explicitly as in violation of the Constitution. The court stated that even where the federal question has been properly raised below, an appeal may be dismissed where appellants fail to attack a statute explicitly in their assignment of errors.

### SILER v. LOUISVILLE & NASHVILLE R. CO.

Supreme Court of the United States, 1909.  
213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. 451.

[The railroad company brought suit in the Circuit Court of the United States for the eastern district of Kentucky to enjoin enforcement against it of an order of the Railroad Commission of Kentucky made under the supposed authority of a Kentucky statute of March 10, 1900, alleging that the statute and order violated several specified provisions of the national Constitution. The Circuit Court held that the statute and order violated section 1 of the Fourteenth Amendment, and granted the injunction prayed for. The Commission took this appeal.]

MR. JUSTICE PECKHAM delivered the opinion of the Court.

The appellants deny the jurisdiction of the Circuit Court in this case. There is no diverse citizenship in the case of this particular company, and the jurisdiction must depend upon the presence of a federal question. The bill filed by the company herein attacked the validity of the act of the legislature of Kentucky of March 10, 1900, on several grounds, as in violation of § 1 of the Fourteenth Amend-

ment. \* \* \* Other grounds of alleged invalidity of the act in question, as in violation of the Federal Constitution, are set up in the bill. The bill also contained the averment that the order of the railroad commission of Kentucky, in making a general schedule of maximum rates for the railroads mentioned in its order, was invalid, as unauthorized by the statute. This is, of course, a local or state question.

The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. \* \* \* Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the Court jurisdiction. *Penn Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 695; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223, *supra*.

The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court. \* \* \*

Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

The commission has assumed the power under this statute of making what are termed general maximum rates for the transportation of all commodities upon all railroads to and from all points within the State, and this company is included in the general order made by the commission. This is an enormous power. Jurisdiction so extensive and comprehensive as must exist in a commission in the making of rates by one general tariff upon all classes of commodities upon all the railroads throughout the State is not to be implied. The proper establishment of reasonable rates upon all commodities carried by railroads, and relating to each and all of them within the State depends upon so many facts which may be very different in regard to each road, that it is plain the work ought not to be attempted without a profound and painstaking investigation, which could not be intelligently or

with discrimination accomplished by wholesale. \* \* \* The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction.

In this case we are without the benefit of a construction of the statute by the highest state court of Kentucky, and we must proceed in the absence of state adjudication upon the subject. Nevertheless, we are compelled to the belief that the statute does not grant to the commission any such great and extensive power as it has assumed to exercise in making the order in question. [The opinion proceeds to state the Court's reasons for this conclusion.]

We are of opinion that under the statute the commission had no authority to make a general tariff of rates, and the final decree of the Circuit Court is for that reason.

Affirmed.

#### NOTES

1. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191; *Light v. United States*, 220 U. S. 523, 538." Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347, 80 L. ed. 688, 711, 56 Sup. Ct. 466 (1936).

2. The rule that a statute will be construed, wherever possible, to avoid constitutional issues was applied in *United States v. Rumely*, 345 U. S. 41, 97 L. ed. 770, 73 Sup. Ct. 543 (1953). Defendant had been convicted of contempt of the Select Committee on Lobbying Activities of the House of Representatives for refusing to give certain evidence pertaining to the activities of the Committee for Constitutional Government, of which he was secretary. The court held that the resolution defining the House Committee's powers had not conferred upon it the authority to inquire into the matters involved, thus avoiding determination of the constitutional issue raised under the First Amendment.

#### ENTERPRISE IRRIGATION DISTRICT v. FARMERS MUTUAL CANAL CO.

Supreme Court of the United States, 1917.  
243 U. S. 157, 61 L. ed. 644, 37 Sup. Ct. 318.

Appeal by writ of error from the Supreme Court of Nebraska.

[This was a suit begun in a Nebraska court to determine the relative rights of the two parties to divert water from a river for irrigation purposes. The issue turned on the validity of the claim of the canal company to certain priorities which it claimed had been adjudicated to it by the State Board of Irrigation acting under a statute which authorized the Board to adjudicate such claims. The plaintiff below pleaded that the Board's adjudication was void, alleging that the Board

had proceeded without adequate notice to adverse parties and without allowing them a reasonable opportunity to be heard, in violation of the due process of law clause of the Fourteenth Amendment. The canal company contested this contention, and in addition pleaded that in reliance upon the Board's decision, and its right to the priorities claimed, it had in good faith expended about a million dollars in completing its canal and diverting works and that the plaintiff with knowledge of this expenditure and construction work had remained silent for a period of four years while the work was going on, and was therefore estopped from challenging the validity of the canal company's claims. The Supreme Court of Nebraska, reversing the trial court, gave judgment for the canal company. The plaintiff appealed by writ of error to the United States Supreme Court, assigning the errors stated in the following opinion.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

\* \* \*

Concisely stated, the assignments of error complain that the Supreme Court infringed the due process and equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the state board's decision, instead of holding that it was made without lawful notice or opportunity to be heard and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. *Hammond v. Johnston*, 142 U. S. 73, 78; *Eustis v. Bolles*, 150 U. S. 361; *Berea College v. Kentucky*, 211 U. S. 45, 53; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 116; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 610. It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. *Pierce v. Somerset Ry.*, 171 U. S. 641, 648; *Lowry v. Silver City Gold & Silver Mining Co.*, 179 U. S.

196. But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran v. Horsky*, 178 U. S. 205, 208; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe v. Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co. v. South Bend*, *ibid.*, 359, 367. But, where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions. *Murdock v. Memphis*, 20 Wall. 590, 635; *Eustis v. Bolles*, *supra*, p. 369; *Leathe v. Thomas*, *supra*; *Arkansas Southern R. R. Co. v. German National Bank*, 207 U. S. 270, 275.

It does not, as we think, admit of doubt that the estoppel in pais is made an independent ground of the judgment. Instead of being interwoven with the validity of the state board's adjudication, which is the other ground, it is distinct from it, and is so treated in the court's opinion. \* \* \*

In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel is without fair support or so unfounded as to be essentially arbitrary or merely a device to prevent a review of the other ground of the judgment. We therefore are not at liberty to inquire whether the ruling is right or wrong. And it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the minds of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance.

It is not urged, nor could it well be, that as a ground of decision the estoppel is not broad enough to sustain the judgment. \* \* \*

The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling. \* \* \*

It results from what has been said that the judgment is one which is not open to review by this court.

Writ of error dismissed.

#### NOTES

1. A comprehensive earlier statement of the rule applied in the reported case (*i. e.*, that if the judgment of the state court rests on state grounds adequate to support it, it is not reviewable by the Supreme Court) is in *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L. ed. 635 (1872), where Mr. Justice Bradley said: "Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other inde-

pendent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground upon which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction."

2. In accord with the principal case is *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. 741 (1888).

### MINNESOTA v. NATIONAL TEA CO.

Supreme Court of the United States, 1940.

309 U. S. 551, 84 L. ed. 920, 60 Sup. Ct. 676.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1933 Minnesota enacted a chain store tax (L. 1933, c. 213) one item of which was a tax on gross sales. § 2 (b). The gross sales tax was graduated: one-twentieth of one per cent was applied on that portion of gross sales not in excess of \$100,000; and larger percentages were applied as the volume of gross sales increased, until one per cent was exacted on that portion of gross sales in excess of \$1,000,000. Respondents (chain stores conducting retail business in Minnesota) paid under protest the gross sales tax demanded by the Minnesota Tax Commission for the years 1933 and 1934 and thereafter sued in the state court for refunds. Judgments granting refunds were affirmed by the Supreme Court of Minnesota, 205 Minn. 443; 286 N. W. 360. We granted certiorari because of the importance of the constitutional issues involved in *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 and *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U. S. 32, which cases, it was asserted, controlled the decision below.

At the threshold of an inquiry into the applicability of the *Stewart* and *Valentine* cases to these facts, we are met with a question which is decisive of the present petition. That is the question of jurisdiction.

The Supreme Court of Minnesota discussed not only the equal protection clause of the Fourteenth Amendment of the federal Constitution but also Art. 9, § 1 of the Minnesota constitution which provides: "Taxes shall be uniform upon the same class of subjects \* \* \*" It said that "these provisions of the Federal and State Constitutions impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation." It stated that the "question is \* \* \* whether the imposition of a graduated gross sales tax upon all those engaged in conducting chain stores is discriminatory as between such owners, thus violating the constitutional requirement of uniformity." It quoted the conclusion of the lower Minnesota

court that the statute violated both the federal and the state constitution. It then adverted briefly to three of its former decisions which had interpreted Art. 9, § 1 of the Minnesota constitution and quoted from one of them. \* \* \*

Respondents contend that the court held the statute invalid for violation not only of the federal constitution but also of the state constitution. Hence they seek to invoke the familiar rule that where a judgment of a state court rests on two grounds, one involving a federal question and the other not, this Court will not take jurisdiction. *Fox Film Corp. v. Muller*, 296 U. S. 207; *Lynch v. New York ex rel. Pierson*, 293 U. S. 52; *New York City v. Central Savings Bank*, 306 U. S. 661. In support of this position they point to the court's discussion of the Minnesota constitution and to the fact that the syllabus states that such a tax is violative of both the Federal and State Constitutions. But as to the latter we are not referred to any Minnesota authority which, as in some states, makes the syllabi the law of the case. And as to the former the opinion is quite inconclusive. For the opinion as a whole leaves the impression that the court probably felt constrained to rule as it did because of the five decisions which it cited and which held such gross sales taxes unconstitutional by reason of the Fourteenth Amendment. That is at least the meaning, if the words used are taken literally. For if, as stated by the court, the "precise question here presented" was ruled by those five cases, that question was a federal one. And in that connection it is perhaps significant that the court stated not only that it "should follow" those decisions but that "it is our duty so to do."

Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, *Honeyman v. Hanan*, 300 U. S. 14, consistently with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

But that does not mean that we should dismiss the petition. This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. *State Tax Commission v. Van Cott*, 306 U. S. 511; *Patterson v. Alabama*, 294 U. S. 600. That principle has been applied to cases coming from state courts where supervening changes had occurred since entry of the judgment, where the record failed adequately to state the facts underlying a decision of the federal question, and where the grounds of the state decision were obscure. *Honeyman v. Hanan*, *supra*, and cases there cited. That principle was also applied in *State Tax Commission v. Van Cott*, *supra*, where it was said p. 514:

"\* \* \* if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought

granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law."

The procedure in those cases was to vacate the judgment and to remand the cause for further proceedings, so that the federal question might be dissected out or the state and federal questions clearly separated.

In this type of case we deem it essential that this procedure be followed. It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review. *State Tax Commission v. Van Cott*, *supra*. On the other hand we cannot be content with a dismissal of the petition where there is strong indication, as here, that the federal constitution as judicially construed controlled the decision below. \* \* \*

It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. \* \* \*

For these reasons we vacate the judgment of the Supreme Court of Minnesota and remand the cause to that court for further proceedings.

Judgment vacated.

MR. JUSTICE McREYNOLDS took no part in the decision of this case.

MR. CHIEF JUSTICE HUGHES, dissenting:

I think that sound principle governing the exercise of our jurisdiction requires the dismissal of the writ. I see no reason to doubt that the Supreme Court of Minnesota held that the tax in question was laid in violation of the uniformity clause of the State Constitution. Not only is that shown, as it seems to me, from the court's discussion of that question, but it conclusively appears from the syllabus which definitely states that the tax is "violative of art. 9, § 1, of our state constitution." 205 Minn. 443; 286 N. W. 360. Minnesota requires that in all cases decided by the Supreme Court it shall give its decision in writing, "together with headnotes, briefly stating the points decided." *Mason's Minn. Stat.*, § 134. In obedience to the statute, the court has thus given explicitly in its syllabus its own deliberate construction of what it has decided.

The decision thus rested upon an adequate non-federal ground and in accordance with long-established doctrine we are without jurisdiction. *Fox Film Corp. v. Muller*, 296 U. S. 207, 210. \* \* \*

The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provision of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the federal constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand. It cannot be supposed that the Supreme Court of Minnesota is not fully conscious of its independent authority to construe the constitution of the state, whatever reasons it may adduce in so doing. \* \* \*

MR. JUSTICE STONE and MR. JUSTICE ROBERTS join in this opinion.

#### NOTES

1. On the remand of this case the Supreme Court of Minnesota affirmed its judgment and rested its decision squarely on the state Constitution. *National Tea Co. v. State*, 208 Minn. 607, 294 N. W. 230 (1940).

2. In accord with the reported case is *Standard Oil Co. v. Johnson*, 316 U. S. 481, 86 L. ed. 1611, 62 Sup. Ct. 1168 (1942). In *Herb v. Pitcairn*, 324 U. S. 117, 89 L. ed. 789, 65 Sup. Ct. 459 (1945), a case similar to *Minnesota v. National Tea Co.*, the Supreme Court, instead of remanding the case to the state court, continued the case on its docket pending application to the state court for amendment of its decision or a certificate to show whether that court intended to rest its decision on an independent state ground or whether decision of the federal question was necessary to the judgment. Upon receipt of clarification from the state court basing its decision on the federal question, the Supreme Court decided the issue. The delay involved in the use of this procedural device was less than three months.

The procedure used in *Herb v. Pitcairn* was followed with less satisfactory results, however, in *Dixon v. Duffy*, 344 U. S. 143, 97 L. ed. 153, 73 Sup. Ct. 193 (1952). Here petitioner, after continuance of the case on the docket of the Supreme Court, was unable to obtain a determination by the Supreme Court of California as to whether the judgment sought to be reviewed had been based on adequate independent state grounds, as that court felt it was without power, for want of jurisdiction, to issue any further order therein. The Supreme Court (Mr. Justice Jackson dissenting) thereupon vacated the judgment and remanded the cause for further proceedings, saying: "A new judgment may be entered, and petitioner also may be informed by an official determination from the Supreme Court of California whether or not that judgment rests on an adequate state ground."

In *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 79 L. ed. 191, 55 Sup. Ct. 16 (1934), certain provisions of the New York income tax law, as construed by the State Tax Commission, were alleged to violate both the federal and state

Constitutions. The Appellate Division of the New York Supreme Court, in annulling the determination of the Tax Commission, cited decisions of the Supreme Court of the United States under the Fourteenth Amendment but did not state that its decision rested upon the application of the federal Constitution. The Court of Appeals, the highest court of the state, affirmed without opinion. The Supreme Court refused to review, stating, through Mr. Chief Justice Hughes: "Jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record. \* \* \* Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

### RAILROAD COMMISSION OF TEXAS v. PULLMAN CO.

Supreme Court of the United States, 1941.  
312 U. S. 496, 85 L. ed. 971, 61 Sup. Ct. 643.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In those sections of Texas where the local passenger traffic is slight, trains carry but one sleeping car. These trains, unlike trains having two or more sleepers, are without a Pullman conductor; the sleeper is in charge of a porter who is subject to the train conductor's control. As is well known, porters on Pullmans are colored and conductors are white. Addressing itself to this situation, the Texas Railroad Commission after due hearing ordered that "no sleeping car shall be operated on any line of railroad in the State of Texas \* \* \* unless such cars are continuously in the charge of an employee \* \* \* having the rank and position of Pullman conductor." Thereupon, the Pullman Company and the railroads affected brought this action in a federal district court to enjoin the Commission's order. Pullman porters were permitted to intervene as complainants, and Pullman conductors entered the litigation in support of the order. Three judges having been convened, Judicial Code, § 266, as amended, 28 U. S. C. § 380, the court enjoined enforcement of the order. From this decree, the case came here directly. Judicial Code, § 238, as amended, 28 U. S. C. § 345.

The Pullman Company and the railroads assailed the order as unauthorized by Texas law as well as violative of the Equal Protection, the Due Process and the Commerce Clauses of the Constitution. The intervening porters adopted these objections but mainly objected to the order as a discrimination against Negroes in violation of the Fourteenth Amendment.

The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on

the state issue would terminate the controversy. It is therefore our duty to turn to a consideration of questions under Texas law.

The Commission found justification for its order in a Texas statute \* \* \*. It is common ground that if the order is within the Commission's authority its subject matter must be included in the Commission's power to prevent "unjust discrimination \* \* \* and to prevent any and all other abuses" in the conduct of railroads. Whether arrangements pertaining to the staffs of Pullman cars are covered by the Texas concept of "discrimination" is far from clear. What practices of the railroads may be deemed to be "abuses" subject to the Commission's correction is equally doubtful. Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statute sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn v. Field Packing Co.*, 290 U. S. 177; *Lee v. Bickell*, 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

An appeal to the chancellor, as we had occasion to recall only the other day, is an appeal to the "exercise of the sound discretion, which guides the determination of courts of equity." *Beal v. Missouri Pacific R. Corp.*, 312 U. S. 45. The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play. \* \* \*

Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise.

The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the state to enforce obedience to the order. *Beal v. Missouri P. R. Corp.*, supra; Article 6476, Texas Civil Statutes. In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. Compare *Thompson v. Magnolia Co.*, 309 U. S. 478.

We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion. Compare *Atlas Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 573, and cases cited.

Reversed and remanded.

#### NOTE

1. In *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 89 L. ed. 101, 65 Sup. Ct. 152 (1944) the judgment of the circuit court of appeals was vacated and the cause remanded to the district court with directions to retain the bill pending the determination of proceedings to be brought "with reasonable promptitude in the state court in conformity with this opinion." The court said, through Mr. Justice Frankfurter: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." The doctrine of the principal case was also followed in *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 86 L. ed. 1355, 62 Sup. Ct. 986 (1942). The rule does not apply, however, where no adequate state remedy is available to which the complainant can resort on the remand of the cause. *Hillsborough Township v. Cromwell*, 326 U. S. 620, 90 L. ed. 358, 66 Sup. Ct. 445 (1946).

#### HERNDON v. GEORGIA.

Supreme Court of the United States, 1935.  
295 U. S. 441, 79 L. ed. 1530, 55 Sup. Ct. 794.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant was sentenced to a term of imprisonment upon conviction by a jury in a Georgia court of first instance of an attempt to incite insurrection by endeavoring to induce others to join in combined resistance to the authority of the state to be accomplished by acts of

violence, in violation of § 56 of the Penal Code of Georgia. The supreme court of the state affirmed the judgment. 178 Ga. 832, 174 S. E. 597, rehearing denied, 179 Ga. 597, 176 S. E. 620. On this appeal, the statute is assailed as contravening the due process clause of the Fourteenth Amendment in certain designated particulars. We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court.

It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation "of the Constitution of the United States," and that this contention was overruled. But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the state Supreme Court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of the state court is conclusive here.

\* \* \*

The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. \* \* \*

Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. \* \* \* The whole point, therefore, is whether the ruling here assailed should have been anticipated.

The trial court instructed the jury that the evidence would not be sufficient to convict the defendant if it did not indicate that his advocacy would be acted upon immediately; and that—"In order to convict the defendant, \* \* \* it would appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated." Petitioner urges that the question presented to the state Supreme Court was whether the evidence made out a violation of the statute as thus construed by the trial court, while the supreme court construed the statute (178 Ga., p. 855) as not requiring that an insurrection should follow instantly or at any given time, but that "it would be sufficient that he [the defendant] intended it to happen at any time, as a result of his influence, by those whom

he sought to incite," and upon that construction determined the sufficiency of the evidence against the defendant. If that were all, the petitioner's contention that the federal question was raised at the earliest opportunity well might be sustained; but it is not all.

The verdict of the jury was returned on January 18, 1933, and judgment immediately followed. On July 5, 1933, the trial court overruled a motion for new trial. The original opinion was handed down and the judgment of the state supreme court entered May 24, 1934, the case having been in that court since the preceding July.

On March 18, 1933, several months prior to the action of the trial court on the motion for new trial, the state supreme court had decided *Carr v. State*, 176 Ga. 747, 169 S. E. 201. In that case § 56 of the Penal Code, under which it arose, was challenged as contravening the Fourteenth Amendment. The court in substance construed the statute as it did in the present case. In the course of the opinion it said (p. 750):

"It [the state] can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency. \* \* \* Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."

The language contained in the subquotation is taken from *People v. Lloyd*, 304 Ill. 23, 35, 136 N. E. 505, and is quoted with approval by this court in *Gitlow v. New York*, 268 U. S. 652, 669.

In the present case, following the language quoted at an earlier point in this opinion to the effect that it was sufficient if the defendant intended an insurrection to follow at any time, etc., the court below, in its original opinion (178 Ga. 855) added—"It was the intention of this law to arrest at its incipency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection." The phrase "at any time" is not found in the foregoing excerpt from the *Carr Case*, but it is there in effect, when the phrase is given the meaning disclosed by the context, as that meaning is pointed out by the court below in its opinion denying the motion for a rehearing (179 Ga. 600), when it said that the phrase was necessarily intended to mean within a reasonable time—"that is, within such time as one's persuasion or other adopted means might

reasonably be expected to be directly operative in causing an insurrection."

Appellant, of course, cannot plead ignorance of the ruling in the Carr Case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction.

Dismissed.

[MR. JUSTICE CARDOZO dissented in an opinion which MR. JUSTICE BRANDEIS and MR. JUSTICE STONE joined. In their view the "protection of the Constitution was seasonably invoked," since the "settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely."]

#### NOTES

1. After commitment to serve his sentence, Herndon petitioned for a writ of habeas corpus in the state court, alleging the unconstitutionality of the Georgia statute under the Fourteenth Amendment. In the new proceeding the state courts recognized that issues of constitutional right under the federal Constitution were properly raised, and in *Herndon v. Lowry*, 301 U. S. 242, 81 L. ed. 1066, 57 Sup. Ct. 732 (1937), the Supreme Court took jurisdiction and reversed the judgment of conviction on the ground that the statute was "so vague and indeterminate" as to prescribe "no reasonably ascertainable standard of guilt" and thus violated the guarantees of liberty embodied in the Fourteenth Amendment.

2. Where the decision of the highest court of the state places a construction upon a statute which is at variance with that formerly adopted by it, and this could not have been anticipated, the petition for rehearing then affords the first opportunity to present a federal question raised by such decision and it is raised in time to sustain the appellate jurisdiction of the Supreme Court. *Brinkerhoff-Paris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. ed. 1107, 50 Sup. Ct. 451 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U. S. 313, 74 L. ed. 870, 50 Sup. Ct. 326 (1930). Generally, however, a federal question first presented in a petition for rehearing to the highest court of the state, after a final decision of that court, and there denied without opinion, is raised too late. *American Surety Co. v. Baldwin*, 287 U. S. 156, 77 L. ed. 231, 53 Sup. Ct. 98, 77 A. L. R. 298 (1932). Cf. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. ed. 360, 53 Sup. Ct. 145, 85 A. L. R. 254 (1932).

## CENTRAL UNION TELEPHONE CO. v. EDWARDSVILLE.

Supreme Court of the United States, 1925.  
269 U. S. 190, 70 L. ed. 229, 46 Sup. Ct. 90.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The City of Edwardsville, in July, 1882, by ordinance granted to the Central Union Telephone Company a right in its streets to erect and maintain the necessary poles and wires for the operation of a telephone system. The Central Telephone Company transferred its rights to the Central Union Telephone Company. Later the city council adopted a resolution requesting the Central Union Telephone Company to furnish to the city, free of charge, one telephone and such additional telephones as the city council might call for at a reduction of 25 per cent from the regular rates, and the right to attach, without charge, fire and police alarm wires to the top cross arm of each pole. The company filed its acceptance of this resolution as provided in the resolution. It maintains 1,000 poles in the City of Edwardsville. The city in 1914 passed an ordinance which in effect imposes a tax of 50 cents a pole upon every person, firm or corporation owning, controlling or occupying any such poles in the streets of Edwardsville. The city brought suit for the amount due under the tax law at 50 cents a pole. A jury was waived, and after a hearing the court entered judgment for \$3,000 against the company. The circuit court held that neither the ordinance by which the Central Telephone Company was permitted to occupy the streets, nor the subsequent resolution accepted by the Central Union Telephone Company constituted a contract and that the tax law was not therefore a violation of the Constitution of the United States in impairing a contract, or in depriving the company of property without due process of law. Upon this record an appeal was taken to the appellate court of the state for the fourth circuit. That court transferred the case to the supreme court of Illinois, on the ground that the appellate court had no jurisdiction of it. *Edwardsville v. Central U. Teleph. Co.*, 302 Ill. 362, 134 N. E. 716. The supreme court held that as the appeal had been taken to the appellate court and errors assigned which that court had jurisdiction to hear, the case was improperly transferred to the supreme court, and remanded it to the appellate court, which gave judgment affirming the circuit court. The plaintiff then obtained a certiorari from the supreme court to review the decision of the appellate court, and in that hearing the supreme court declined to hear the constitutional questions on the ground that they had been waived by the failure to carry the case from the circuit court directly to the supreme court to review those questions.

Paragraph 89, § 88 (3 Starr & C. Anno. Stat. (Ill.) p. 3114 reads as follows:

"Par. 89. Appeal from trial court to appellate court—From trial court to supreme court. Sec. 88. Appeals from and writs of error to circuit courts, the superior court of Cook county, the criminal court of Cook county, county courts and city courts in all criminal cases, below the grade of felony, shall be taken directly to the appellate court, and in all criminal cases above the grade of misdemeanors, and cases in which a franchise or freehold or the validity of a statute or construction of the Constitution is involved; and in all cases relating to revenue, or in which the State is interested as a party or otherwise, shall be taken directly to the supreme court."

The construction of this statute has been uniformly held to be that where a question involves the Constitution, it must be taken on error or appeal to the supreme court, and that if it be taken to the appellate court on other grounds, the party taking the appeal or suing out the writ of error shall be held to have waived the constitutional questions. \* \* \* The city, therefore, moves to dismiss the writ of error.

It is objected on behalf of the plaintiff in error that the words "validity of a statute or construction of the Constitution" refers to the Constitution of Illinois and not to the Federal Constitution. The supreme court of Illinois has held otherwise in this case. 309 Ill. 482-484, 141 N. E. 206.

But counsel for plaintiff in error insist that it is for this court to determine finally whether a litigant in a state court has waived his Federal right—citing *Davis v. O'Hara*, 266 U. S. 314; *Davis v. Wechsler*, 263 U. S. 22; *American R. Exp. Co. v. Levee*, 263 U. S. 19; *Truax v. Corrigan*, 257 U. S. 312; *Union P. R. Co. v. Public Serv. Commission*, 248 U. S. 67. But there is nothing in these cases which justifies this court in ignoring or setting aside a required form of practice under the appellate statutes of the state by which Federal constitutional rights, as well as state constitutional rights, may be asserted in the supreme court of the state or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court. We said in *John v. Paullin*, 231 U. S. 583, 588: "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law," and many cases are there cited.

It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, Federal or state, he may take the case directly to the supreme court and have that question decided, together with all the other questions

in the case, and then if the Federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the appellate court, he may have the nonconstitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court. There is some complaint that counsel could not infer that the constitutional questions referred to in the statute were Federal questions, because the supreme court of Illinois had not so decided before this case. We have not been able to determine from the Illinois decision cited above whether any of the constitutional questions held to be waived therein were Federal until the present case. It is not, however, a forced or strained interpretation to hold that "cases \* \* \* in which the validity of a statute or construction of the Constitution is involved" include validity under, or construction of, both Constitutions. When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a Federal right as to obstruct it. This is no such case. \* \* \*

The motion to dismiss the writ of error is granted.

#### NOTES

1. Consider the fact situation presented in *Parker v. Illinois*, 333 U. S. 571, 92 L. ed. 886, 68 Sup. Ct. 708 (1948). Petitioner, who was engaged in litigation in the Illinois courts, was ordered on a motion for discovery to produce certain documents. He produced them by filing them with the clerk of the Illinois courts. Petitioner was thereupon found guilty of contempt, the court holding that the order required only that petitioner produce the documents, not that he file them in court so as to make them public records; and that his action in so doing, since the documents contained statements deemed to be scurrilous, constituted an obstruction of justice. Petitioner was sentenced to jail for ninety days. He sought writ of error in the Illinois Supreme Court for review of the order. The writ of error was refused and on the same day an amended contempt order was issued to "cure certain defects" in the prior order and to bring it into conformity with the Illinois law. Petitioner then sought relief in the Illinois Appellate Court, where he attacked the order on the ground that it violated the federal Constitution. This court sustained the order on state grounds, refusing to consider the constitutional questions. On writ of error, the Illinois Supreme Court affirmed, refusing also to consider the constitutional questions under the well-settled rule in Illinois that if an appellant takes his case to the Appellate Court where errors are assigned of which that court has jurisdiction, he is deemed to have waived any constitutional questions. On certiorari, the Supreme Court of the United States affirmed on the authority of *Central Union Telephone Co. v. Edwardsville*.

Speaking for the court, Mr. Justice Douglas said that "when petitioner acting through counsel decided to seek review in the Appellate Court he made a choice which involved abandonment of the constitutional issues which he had raised in the proceedings" and that "even though the attempt may have seemed futile, it was only by first seeking review in the Illinois Supreme Court that he could bring to this Court the constitutional questions raised under the amended order." Mr. Justice Rutledge, with the concurrence of Justices Black and Murphy, dissented on the ground that the original order and the amended

order were in reality the same order, so that the appellate route taken by petitioner should not have been held to operate as a waiver of his constitutional objections to a commitment which the dissenters characterized as a denial of due process. "Constitutional rights," said the dissenting opinion, "may be nullified quite as readily and completely by hypertechnical procedural obstructions to their effective assertion and maintenance as by outright substantive denial."

2. Power to issue writs of habeas corpus has been conferred upon the federal courts by statute (28 U. S. C. §2241 *et seq.*) and includes the authority to issue the writ where the petitioner is held in custody by state authority in violation of his rights under the Constitution or laws of the United States. It is well-settled that the exercise of this power is within the sound discretion of the federal courts. The power to interfere with state proceedings, however, is a delicate one and is subject to the general qualification that a federal court should require that the judicial remedies afforded by state courts shall first have been exhausted. In *Mooney v. Holohan*, 294 U. S. 103, 79 L. ed. 791, 55 Sup. Ct. 340, 98 A. L. R. 406 (1935), application for habeas corpus was denied by the Supreme Court of the United States on the ground that, although Mooney had prosecuted numerous appeals to the highest court of the State of California, his proper remedy before that court was habeas corpus, and that until he availed himself of that remedy a federal court could not consider his petition. See also, *Ex parte Hawk*, 321 U. S. 114, 88 L. ed. 572, 64 Sup. Ct. 448 (1944). For an annotation on the exhaustion of judicial remedies afforded by state courts as a condition of issuance of a writ of habeas corpus by a federal court for release of a petitioner held by state authorities, see 88 L. ed. 576.

3. In *Young v. Ragen*, 337 U. S. 235, 93 L. ed. 1333, 69 Sup. Ct. 1073 (1949), the Supreme Court was "again faced with the recurring problem of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised." Various persons in custody under judgments of Illinois circuit courts petitioned in these courts for writs of habeas corpus on the ground of denial of due process of law under the Fourteenth Amendment. These petitions were denied as "insufficient in law and substance." The Attorney General of the state explained that the denials were based on procedural grounds, *i. e.*, that habeas corpus was not an appropriate remedy for the relief of denials of due process. He contended, however, that certain statements in three opinions of the Illinois Supreme Court handed down subsequent to the denials of the writ strongly indicated that the scope of habeas corpus in Illinois had been broadened and that it would be considered an appropriate remedy if petitions for relief were again presented. However, many circuit courts, whose decisions upon habeas corpus are unreviewable by the state supreme court under Illinois law, had continued to deny habeas corpus on procedural grounds since the new pronouncements. In an opinion by Mr. Chief Justice Vinson, the Supreme Court vacated the orders denying the writ and remanded the causes to the state courts for reconsideration of the availability of habeas corpus in the light of the state supreme court's opinions in the later cases. The court stated its position as follows:

"Of course we do not review decisions which rest upon adequate nonfederal grounds, and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. \* \* \* But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right. \* \* \* Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts \* \* \* presupposes that some adequate state remedy exists. \* \* \* If there

is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case."

4. The doctrine of exhaustion of judicial remedies is provided for in the Judicial Code (28 U. S. C. § 2254).

### MUSKRAT v. UNITED STATES.

Supreme Court of the United States, 1911.

219 U. S. 346, 55 L. ed. 246, 31 Sup. Ct. 250.

[Appeals from the Court of Claims. An Act of Congress authorized Muskrat and others to bring suits in the Court of Claims, with an appeal to the Supreme Court of the United States, to determine the constitutionality of certain congressional legislation altering the terms of certain prior allotments of Cherokee Indian lands. From two such suits in which the validity of the Acts was sustained, these appeals were taken.]

MR. JUSTICE DAY delivered the opinion of the Court. \* \* \*

The first question in these cases, as in others, involves the jurisdiction of this Court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States.

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

\* \* \* It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation upon the inferior courts of the United States. \* \* \*

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred. \* \* \*

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the Court, the leading case on the subject being *Marbury v. Madison*, *supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. \* \* \*

See also in this connection *Chicago & Grand Trunk Railway Company v. Wellman*, 143 U. S. 339. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." \* \* \*

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts

of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution. \* \* \*

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. \* \* \*

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

## NOTES

1. The constitutions of a few states require either the judges of their supreme courts or "the Supreme Court" (Colorado) to give advisory opinions on questions of law, in Massachusetts at the request of "each branch of the legislature, as well as the Governor and Council" (construed not to mean the Governor alone), in New Hampshire similar provision, in Maine at the request of the "Governor, Council, Senate or House of Representatives," in Rhode Island, Colorado and formerly Missouri at the request of the Governor or either house, and in Florida and South Dakota at the request of the Governor. Commonly these questions are as to the validity of legislation or proposed legislation. Such opinions are generally not regarded as binding either upon the legislature or executive advised or upon the judges who give the advice, should the same question come before them in a litigated case. This institution has as a forerunner the practice in England under which the King and the House of Lords, in their legislative capacity, required the opinions of the judges. In the absence of an express requirement in a state Constitution, American judges usually but not invariably have declined to give such opinions, following a precedent set by Chief Justice Jay and the associate justices of the United States Supreme Court in 1793, when President Washington requested their opinion. The function has been regarded as nonjudicial, and where a Constitution makes no provision for its exercise by the courts it has been held generally that a statute is invalid which attempts to impose it upon them. Consult: Ellingwood, *Departmental Cooperation in State Government* (1918); Thayer, *Legal Essays* (1908), 42-59; Frankfurter, *A Note on Advisory Opinions*, 37 *Harv. L. Rev.* 1002 (1924); Hudson, *Advisory Opinions of National and International Courts*, 37 *Harv. L. Rev.* 970 (1924); Field, *The Advisory Opinion—An Analysis*, 24 *Ind. L. J.* 203 (1949).

2. The present status of the Court of Claims is considered in *Williams v. United States*, 289 U. S. 553, 77 L. ed. 1372, 53 Sup. Ct. 751 (1933), where it is pointed out that the court was created originally by Congress not under Article III of the Constitution but as a special tribunal of an administrative or advisory nature to consider claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its constitutional power to pay the debts of the United States. The court could therefore be required to give advisory opinions. Later legislation converted the Court of Claims into a court, in fact as well as in name, and vested in it jurisdiction over controversies which were susceptible of judicial cognizance. The appellate jurisdiction of the Supreme Court is now properly extended by Congress to the judicial decisions of the Court of Claims but not to its legislative or advisory decisions.

The distinction between "constitutional" courts, established under Article III of the Constitution, and "legislative" courts, established under authority given by other provisions of the Constitution, is discussed in *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, 53 Sup. Ct. 740 (1933). See also, Katz, *Federal Legislative Courts*, 43 *Harv. L. Rev.* 894 (1930), 4 *Selected Essays on Constitutional Law* (1938), 1211; Watson, *Concept of the Legislative Court: A Constitutional Fiction*, 10 *Geo. Wash. L. Rev.* 799 (1942).

## INTERSTATE COMMERCE COMMISSION v. BRIMSON.

Supreme Court of the United States, 1894.  
154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. 1125.

[The Act of February 4, 1887, establishing the Interstate Commerce Commission provided: "\* \* \* for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Brimson and others having refused to answer questions put to them in an investigation conducted by the Commission, the latter filed in the proper Circuit Court of the United States a bill praying the court to issue an order directing them to answer. The court dismissed the petition and the Commission appealed.]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the Commission? The Court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Art. III, Sec. 2), and as the Circuit

Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress, 25 Stat. 434, c. 866, the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended. \* \* \*

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? \* \* \*

We have before us an act of Congress authorizing the Interstate Commerce Commission to summon witnesses, and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation—is, we repeat, not disputed, and is beyond dispute. \* \* \* Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of Congress and seek to obstruct its enforcement. And these issues, made in the form prescribed by the act of Congress, are so presented that the judicial power is capable of acting on them. \* \* \*

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested,—the validity of which is not questioned,—of compelling a witness to testify before the Interstate Commerce Commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is

also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form.

\* \* \*

The present proceeding is not merely ancillary and advisory. \* \* \* If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's Case*, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution. \* \* \*

Judgment reversed.

[MR. CHIEF JUSTICE FULLER and JUSTICES BREWER and JACKSON dissented. See 155 U. S. 3.]

## NOTES

1. The power of courts to punish contempts of court—contumacy of witnesses, refusal to obey orders of the court, obstructions of the proceedings of the court, etc.—was invariably held to be inherent in courts of record at common law. There is some divergence of view as to whether the power is inherent in inferior courts not of record, but there is no doubt that the power may be vested by statute in the latter courts. The cases are collected in 8 A. L. R. 1543 (1920); 54 A. L. R. 318 (1928); 73 A. L. R. 1185 (1931). On the nature and scope of the contempt power, see 17 C. J. S., Contempt § 43 *et seq.* The more usual method adopted in current legislation to enforce the attendance of witnesses and insure their testifying and producing documents before administrative bodies is the device held valid in the reported case.

2. Clyde Wilson Summers complied with all the prerequisites for admission to the Illinois bar except obtaining the certificate of the Committee on Character and Fitness. He filed a petition in the Supreme Court of Illinois, alleging that the certificate was refused solely because he was a conscientious objector to

participation in war and that his exclusion from the bar for this reason violated the due process clause of the Fourteenth Amendment, which secured to him protection against state action violative of the principles of the First Amendment. The court did not make a formal decision, but the Chief Justice wrote a letter to Summers stating that "the Court is of the opinion that the report of the Committee on Character and Fitness should be sustained." None of the correspondence with Summers appeared on the records of the court. In their return to a rule to show cause why the record should not be certified to the United States Supreme Court and certiorari granted, the justices of the Illinois Supreme Court stated that under the law of that state the proceeding was not a matter of judicial cognizance and did not constitute a case or controversy under Article III of the federal Constitution but was a mere application for appointment as an officer of the court. The Supreme Court of the United States held, however, that there was a case or controversy under Article III of the Constitution, even though for state purposes the action was nonjudicial. "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution when Federal questions are raised and proper steps taken to that end, in this Court." *Re Summers*, 325 U. S. 561, 89 L. ed. 1795, 65 Sup. Ct. 1307 (1945).

3. The Federal Radio Commission granted an application for a renewal license to the General Electric Company upon terms not acceptable to the licensee. The Court of Appeals of the District of Columbia, to which the company had appealed under section 16 of the Radio Act of 1927, found that the terms of the existing license would better serve the public interest, convenience and necessity and remanded the proceeding to the commission with a direction to carry the court's decision into effect. Granting certiorari on petition of the commission, the Supreme Court of the United States concluded that the proceeding in the Court of Appeals was not a case or controversy under Article III of the Constitution but merely an administrative proceeding, and therefore that the decision therein was not reviewable. "We think it plain from this résumé of the pertinent parts of the act that the powers confided to the commission respecting the granting and renewal of station licenses are purely administrative, and that the provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field." *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 74 L. ed. 969, 50 Sup. Ct. 389 (1930). Congress later amended the statute so as to confine the review by the Court of Appeals to "questions of law" and provided that "findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." Jurisdiction was vested in the Supreme Court to review judgments of the Court of Appeals under the act. In a subsequent action to review a decision of the Court of Appeals reversing the Commission's order terminating a license, the Supreme Court held that it had jurisdiction, since the amended procedure had provided for a judicial judgment of the lower court and was in sharp contrast with the previous grant of authority. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 77 L. ed. 1166, 53 Sup. Ct. 627, 89 A. L. R. 406 (1933).

4. For a recent case holding that the court below should have dismissed the suit for lack of a case or controversy, see *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U. S. 222, 98 L. ed. 650, 74 Sup. Ct. 447 (1954).

NASHVILLE, CHATTANOOGA & ST. LOUIS R. CO.  
v. WALLACE.

Supreme Court of the United States, 1933.  
288 U. S. 249, 77 L. ed. 730, 53 Sup. Ct. 345, 87 A. L. R. 1191.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellant brought suit in the Chancery Court of Davidson County, Tennessee, under the Uniform Declaratory Judgments Act of that state, c. 29, Tennessee Public Acts, 1923, to secure a judicial declaration that a state excise tax levied on the storage of gasoline, c. 58, Tennessee Public Acts, 1923, as amended by c. 67, Tennessee Public Acts, 1925, is, as applied to appellant, invalid under the commerce clause and the Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the Supreme Court of the State and the case comes here on appeal under § 237(a) of the Judicial Code.

After the jurisdictional statement required by Rule 12 was submitted, this Court, in ordering the cause set down for argument, invited the attention of counsel to the question "whether a case or controversy is presented in view of the nature of the proceedings in the state court." This preliminary question, which has been elaborately briefed and argued, must first be considered, for the judicial power with which this Court is invested by Art. 3, § 1 of the Constitution, extends by Art. 3, § 2, only to "cases" and "controversies"; if no "case" or "controversy" is presented for decision, we are without power to review the decree of the court below. *Muskraat v. United States*, 219 U. S. 346.

In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. See *Fidelity National Bank v. Swope*, 274 U. S. 123; compare *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 498. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as "declaratory," but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts.

Section 1 of the Tennessee Declaratory Judgments Act confers jurisdiction on courts of record "to declare rights \* \* \* whether or not further relief is or could be claimed" and provides that "no action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and such declaration shall have the force and effect of a final judgment or decree." By § 2 it is provided that "any person \* \* \* whose rights, status or other legal relations are affected by a statute \* \* \* may have determined any question of construction or validity arising under the \* \* \*

statute \* \* \* and obtain a declaration of rights \* \* \* thereunder."

Under § 6, the Court may refuse to render a declaratory judgment where, if rendered, it "would not terminate the uncertainty or controversy giving rise to the proceeding." Declaratory judgments may, in accordance with § 7, be reviewed as are other orders, judgments or decrees, and under § 8 "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Section 11 requires that "when declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

This statute has often been considered by the highest court of Tennessee, which has consistently held that its provisions may only be invoked when the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered. \* \* \* It has also held that no judgment or decree will be rendered when all the parties who will be adversely affected by it are not before the court. \* \* \*

That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378; compare *Terrace v. Thompson*, 263 U. S. 197; *Pierce v. Society of Sisters*, 268 U. S. 510; *Euclid v. Ambler Realty Co.*, 272 U. S. 365. The proceeding terminating in the decree below, unlike that in *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U. S. 300; *Musk-rat v. United States*, 219 U. S. 346, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike *Fairchild v. Hughes*, 258 U. S. 126; *Texas v. Interstate Commerce Commission*, 258 U. S. 158; *Massachusetts v. Mellon*, 262 U. S. 447; *New Jersey v. Sargent*, 269 U. S. 328, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the decision of the question of law; and unlike *Luther v. Borden*, 7 How. 1; *Field v. Clark*, 143 U. S. 649; *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428; *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the tax, see *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 724; and that adjudication is not, as in *Gordon v. United States*, 2 Wall. 561, and *Postum Cereal Co. v. California Fig*

Nut Co., 272 U.S. 693, subject to revision by some other and more authoritative agency. Obviously the appellant, whose duty to pay the tax will be determined by the decision of this case, is not attempting to secure an abstract determination by the Court of the validity of a statute, compare *Muskrat v. United States*, supra, 361; *Texas v. Interstate Commerce Commission*, supra, 162; or a decision advising what the law would be on an uncertain or hypothetical state of facts, as was thought to be the case in *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, and *Willing v. Chicago Auditorium Assn.*, 277 U.S. 274; see also *Warehouse Co. v. Tobacco Growers Assn.*, 276 U.S. 71, 88; compare *Arizona v. California*, 283 U.S. 423, 463. Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax.

While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. *Fidelity National Bank v. Swope*, supra, 132. This Court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties, *Louisiana v. Mississippi*, 202 U.S. 1; *Arkansas v. Tennessee*, 246 U.S. 158; *Georgia v. South Carolina*, 257 U.S. 516; *Oklahoma v. Texas*, 272 U.S. 21; *Michigan v. Wisconsin*, 272 U.S. 398, and to review judgments of the Court of Claims, although no process issues against the Government. *United States v. Jones*, 119 U.S. 477; compare *District of Columbia v. Eslin*, 183 U.S. 62; *Ex parte Pocono Pines Hotels Co.*, 285 U.S. 526, reported below in 73 Ct. Cls. 447. As we said in *Fidelity National Bank v. Swope*, supra, 132, "Naturalization proceedings, *Tutun v. United States*, 270 U.S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will; *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. 222; bills of interpleader so far as the stakeholder is concerned, *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 680; bills to quiet title where the plaintiff rests his claim on adverse possession, *Sharon v. Tucker*, 144 U.S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that damages are required to be paid or acts to be performed by the parties." See also *Old Colony Trust Co. v. Commissioner*, supra, 725; *La Abra Silver Mining Co. v. United States*, 175 U.S. 423.

The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below. See *Old Colony Trust Co. v. Commissioner*, *supra*, 724. As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial. Such was the purport and effect of our decision in *Fidelity National Bank v. Swope*, *supra*, where it was held that a final judgment rendered by a state court in an adversary proceeding brought under a state statute to determine the validity of liens about to be imposed for benefits assessed under a city improvement ordinance, presented a case within the appellate jurisdiction of this Court. Accordingly, we must consider the constitutional questions raised by the appeal. [In doing so the Court came to the conclusion that the Tennessee tax as applied to appellants did not violate either the Commerce Clause or the Fourteenth Amendment to the Constitution and affirmed the decree of the Tennessee court.]

#### NOTES

1. Statutes authorizing declaratory judgments have been adopted in most states and by Congress. The principal differences between declaratory judgment procedure and proceedings for an injunction are that in the former the imminence of the threatened injury need not be alleged or shown and no executory process must follow the court's action in declaring the rights of the parties. For a full discussion of the subject, see Borchard, *Declaratory Judgments* (2d ed. 1941).

2. In *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 81 L. ed. 617, 57 Sup. Ct. 461, 108 A. L. R. 1000 (1937), sustaining the federal Declaratory Judgment Act of June 14, 1934 (28 U. S. C. §§ 2201, 2202), the Supreme Court

held that a United States district court was thereby given authority to make a binding declaration of the legal rights and obligations of the plaintiff insurance company to defendant policyholder, arising out of insurance contracts, there being a dispute whether the latter had become "totally and permanently disabled" and thereby entitled to certain rights under policies held by him. The policyholder had refrained from suing, with the result that the company had no means of bringing the dispute to a judicial test other than by petition for a declaration under the Declaratory Judgment Act. No federal question being involved, the basis of the district court's jurisdiction was diverse state citizenship of the parties. Mr. Chief Justice Hughes, for the court, said in part: "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. \* \* \* In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends."

3. Subsequent decisions of the Supreme Court have emphasized the requirement that in order to secure declaratory relief the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. In *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419, 82 L. ed. 936, 58 Sup. Ct. 678, 115 A. L. R. 105 (1938), where a declaratory judgment was sought that the Public Utility Holding Company Act of 1935 was unconstitutional, the court, through Mr. Chief Justice Hughes, said: "The District Court did not err in dismissing the cross bill. Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts. \* \* \* By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation." See also *Coffman v. Breeze Corporations*, 323 U. S. 316, 89 L. ed. 264, 65 Sup. Ct. 298 (1945); *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 89 L. ed. 1725, 65 Sup. Ct. 1384 (1945).

PACIFIC STATES TELEPHONE & TELEGRAPH CO.  
v. OREGON.

Supreme Court of the United States, 1912.  
223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. 224.

[In 1902 the State of Oregon amended its constitution and made provision, in addition to legislation by the ordinary legislatures, for legislation by popular initiative and direct vote of the people. By this method a statute taxing corporations was adopted. In a suit brought by the state to collect the tax the defendant, the telephone company, pleaded that the tax statute was invalid by reason of Article IV, Section 4 of the federal Constitution. The State Supreme Court affirmed

a decision which sustained a demurrer to this defense and on writ of error the case was brought to this court. The chief contention of the plaintiff in error is:

"The guaranty of Article IV, Section 4, of the federal Constitution is to the people of the states, and to each citizen, as well as to the states as political entities. Section 4 of Article IV therefore prohibits the majority in any state from adopting an unrepubli- can constitution. The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a state to the Union and which the state is bound to maintain."

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court.

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practice of the Government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress. \* \* \*

The contention [of the plaintiff in error], if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and the national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national government, and however all the departments of that government may recognize such state

government, nevertheless every citizen of such state or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence of the state. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a state and if such contention be thought well founded to disregard the existence in fact of the state, of its recognition by all of the departments of the federal government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.

\* \* \*

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed \* \* \* [by] the leading and absolutely controlling case—*Luther v. Borden*, 7 How. 1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government sometimes described as "the government established by a voluntary convention" to overthrow the established charter government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs to support the contention of the illegality of the charter government and the legality of the voluntary government "although that government never was able to exercise any authority in the state nor to command obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority

of the male people of the state of the age of 21 years and upwards and also by a large majority of those who were entitled to vote for general officers cast in favor of a constitution which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, \* \* \* pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled. The Court said (p. 42):

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts." \* \* \*

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. \* \* \*

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

## NOTES

1. The development of the doctrine of political questions is a striking example of "judicial self-limitation." In the main, the Supreme Court's refusal to take jurisdiction in cases of this type has been due either to fear of the consequences of a judicial determination of the thorny issues involved or to lack of adequate data. The doctrine has thus been utilized not only in situations where the court has felt that decisions by the legislative or executive branches of government would be more appropriate but where the court would be dependent upon these branches to make its own decisions effective. The subject is discussed in Finkelstein, *Judicial Self-Limitation*, 37 *Harv. L. Rev.* 338 (1923), 1 *Selected Essays on Constitutional Law* (1938), 397; Weston, *Political Questions*, 38 *Harv. L. Rev.* 296 (1925), 1 *Selected Essays on Constitutional Law* (1938), 418; Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 *Harv. L. Rev.* 221 (1926); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 *Minn. L. Rev.* 485, (1924); Dodd, *Judicially Nonenforceable Provisions of Constitutions*, 80 *U. of Pa. L. Rev.* 54 (1931), 1 *Selected Essays on Constitutional Law* (1938), 355.

2. In *Coleman v. Miller*, 307 U. S. 433, 83 L. ed. 1385, 59 Sup. Ct. 972, 122 A. L. R. 695 (1939) the Supreme Court was asked to pass upon the efficacy of the ratification by the State of Kansas of the proposed Child Labor Amendment to the federal Constitution. As regards the question of whether the Lieutenant Governor was part of the legislature so that he would have a deciding vote (when the senate was equally divided) on the ratification of the amendment, the court said it was equally divided as to whether this presented a question which was political in nature and hence not justiciable and expressed no opinion on the point. As regards the question of the efficacy of legislative ratification in the light of previous rejection or attempted withdrawal, the Court said the question must be regarded as political, with the ultimate authority in Congress in the exercise of its control over the promulgation of the adoption of the amendment. On the issue of whether the proposal had lost its vitality through lapse of time since its submission, and hence could not be effectively ratified by the Kansas legislature, the court said this, too, involved considerations appropriate for the decision of Congress and therefore was essentially political.

3. In *Colegrove v. Green*, 328 U. S. 549, 90 L. ed. 1432, 66 Sup. Ct. 1198 (1946) the Supreme Court refused to restrain election officials of Illinois from acting under a state statute which created Congressional districts of noncontiguous territory and grossly unequal population. The complaint was brought under the federal Declaratory Judgment Act for a decree declaring the Illinois statute apportioning the state into Congressional districts invalid in that the districts lacked compactness of territory and approximate equality of population, and therefore violated various provisions of the United States Constitution and legislation of Congress dealing with apportionment. Seven justices sat in the case. Three justices (Frankfurter, Reed and Burton) thought the issues involved were political in nature. Three other justices (Black, Douglas and Murphy) dissented on the ground that the question was justiciable and that personal harm

had been shown which entitled appellants to the equitable relief demanded. The remaining justice (Rutledge) agreed with the dissenters that the question was justiciable, but concurred in the result of dismissal on the ground that, as a matter of equitable discretion, jurisdiction was properly declined. In announcing the "judgment" of the court, Mr. Justice Frankfurter said: "Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."

4. In *South v. Peters*, 339 U. S. 276, 94 L. ed. 834, 70 Sup. Ct. 641 (1950) residents of the most populous county of Georgia sought to enjoin operation of a state statute which allegedly reduced the weight of plaintiff's votes to one-tenth the weight of those in other counties by providing that all of a county's "unit votes" in a primary election would be awarded the candidate receiving the highest popular vote in the county. Each county is allotted a number of unit votes, running from six for the eight most populous counties, to two for most of the counties. Plaintiffs showed that a vote in one county will be worth over 120 times each of their votes. They showed that in 45 counties a vote will be given 20 times the weight of each of theirs. They showed that on a state-wide average each vote outside their county (Fulton) will have over 11 times the weight of each vote of the plaintiffs. The Supreme Court affirmed the lower court's dismissal of the petition, saying: "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." Justices Douglas and Black dissented on the ground that the unit system violated plaintiffs' constitutional rights. They said: "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. It also includes the right to have the vote counted at full value without dilution or discount. That federally protected right suffers substantial dilution in this case. \* \* \*"

### FAIRCHILD v. HUGHES.

Supreme Court of the United States, 1922.  
258 U. S. 126, 66 L. ed. 499, 42 Sup. Ct. 274.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On July 7, 1920, Charles S. Fairchild of New York brought this suit in the Supreme Court of the District of Columbia against the Secretary of State and the Attorney General. The prayers of the bill are that "the so-called Suffrage Amendment [the Nineteenth to the federal Constitution] be declared unconstitutional and void"; that the Secretary of State be restrained from issuing any proclamation declaring that it has been ratified; and that the Attorney General be restrained from enforcing it. There is also a prayer for general relief and for an interlocutory injunction. The plaintiff, and others on whose behalf he sues, are citizens of the United States, taxpayers and members of the American Constitutional League, a voluntary association which describes itself as engaged in diffusing "knowledge as to the fundamental principles of

the American Constitution, and especially that which gives to each State the right to determine for itself the question as to who should exercise the elective franchise therein."

The claim to relief was rested upon the following allegations: The legislatures of thirty-four of the States have passed resolutions purporting to ratify the Suffrage Amendment; and from one other State the Secretary of State of the United States has received a certificate to that effect purporting to come from the proper officer. The proposed Amendment cannot, for reasons stated, be made a part of the Constitution through ratification by the legislatures; and there are also specific reasons why the resolutions already adopted in several of the States are inoperative. But the Secretary has declared that he is without power to examine into the validity of alleged acts of ratification, and that, upon receiving from one additional State the customary certificate, he will issue a proclamation declaring that the Suffrage Amendment has been adopted. Furthermore, "a force bill" has been introduced in the Senate which provides fine and imprisonment for any person who refuses to allow women to vote; and if the bill is enacted, the Attorney General will be required to enforce its provisions. The threatened proclamation of the adoption of the Amendment would not be conclusive of its validity, but it would lead election officers to permit women to vote in States whose constitutions limit suffrage to men. This would prevent ascertainment of the wishes of the legally qualified voters, and elections, state and federal, would be void. Free citizens would be deprived of their right to have such elections duly held; the effectiveness of their votes would be diminished; and election expenses would be nearly doubled. Thus irremediable mischief would result. [The Supreme Court of the District decreed a dismissal, the Court of Appeals of the District affirmed the decree and the plaintiff appealed to this Court.]

Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case within the meaning of § 2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights or the prevention, redress, or punishment of wrongs." See *In re Pacific Railway Commission*, 32 Fed. 241, 255, quoted in *Muskraat v. United States*, 219 U. S. 346, 356. The alleged wrongful act of the Secretary of State, said to be threatening, is the issuing of a proclamation which plaintiff asserts will be vain but will mislead election officers. The alleged wrongful act of the Attorney General, said to be threatening, is the enforcement, as against election officers, of the penalties to be imposed by a contemplated act of Congress which plaintiff asserts would be unconstitutional. But

plaintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid. Compare *Giles v. Harris*, 189 U. S. 475; *Tyler v. Judges of Court of Registration*, 179 U. S. 405.

Decree affirmed.

#### NOTES

1. In *Smith v. Indiana*, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. 51 (1903) an Indiana taxpayer petitioned an Indiana court for a mandamus to compel an Indiana county officer to allow a deduction from the tax assessment on his land by reason of a mortgage thereon, in accordance with an Indiana statute. The defending officer set up that the statute was invalid both under the state and federal Constitutions. The state Supreme Court affirmed a judgment holding the statute valid and granting the writ. The defending officer appealed to the United States Supreme Court, which refused to hear the appeal on the ground that the appealing officer had no personal interest in the litigation.

2. In *Ex parte Levitt*, 302 U. S. 633, 82 L. ed. 493, 58 Sup. Ct. 1 (1937), which involved an effort to contest the appointment of Mr. Justice Black to the Supreme Court of the United States, the court said that the petitioner's interest as a citizen and a member of the bar of the court was insufficient. "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

3. In *Tilston v. Ullman*, 318 U. S. 44, 87 L. ed. 603, 63 Sup. Ct. 493 (1943) the plaintiff, a registered physician, brought an action in the state courts for a declaratory judgment as to whether Connecticut statutes prohibited him from prescribing the use of contraceptive devices for married women patients and, if so, whether such statutes violated the Fourteenth Amendment to the federal Constitution. Plaintiff alleged that if the statutes did apply to him they would prevent his prescribing contraceptives for three patients whose health was such that their lives would be endangered by childbearing. The state court ruled that the statutes applied to the plaintiff and were constitutional. On appeal the Supreme Court said: "We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf."

4. The Premier-Pabst Sales Company, a Delaware corporation, brought a bill in a federal district court to restrain Pennsylvania officers from enforcing a Pennsylvania beer license statute. It alleged that the statute violated both the commerce and equal protection clauses of the federal Constitution because it imposed higher license fees for distributing beer brought into the state than

for beer made in the state. Under the Pennsylvania law no corporation could obtain a license to distribute beer wherever made unless all of its officers and directors and 51 per cent of its stockholders were residents of the state for two years prior to application for a license. None of the plaintiff officers or shareholders were residents of the state. Affirming the district court's dismissal of the bill, the Supreme Court said: "As no license could legally issue to the Company in any event, it cannot be injured by the alleged unconstitutional discrimination; and hence has no standing to challenge provisions of the Act." *Premier-Pabst Sales Co. v. Grosscup*, 298 U. S. 226, 80 L. ed. 1155, 56 Sup. Ct. 754 (1936).

5. In *Coleman v. Miller*, 307 U. S. 433, 83 L. ed. 1385, 59 Sup. Ct. 972, 122 A. L. R. 695 (1939) the Supreme Court held (Justices Frankfurter, Roberts, Black and Douglas dissenting on the point) that twenty state senators of the State of Kansas whose votes, if their contention were sustained, would have been sufficient to defeat ratification of the proposed Child Labor Amendment to the Constitution, had a "plain, direct and adequate interest in maintaining the effectiveness of their votes." The court said: "They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

6. Informative discussions of justiciability and standing to sue are to be found in the several opinions in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 95 L. ed. 817, 71 Sup. Ct. 624 (1951), particularly the concurring opinion of Mr. Justice Frankfurter. In *Adler v. Board of Education*, 342 U. S. 485, 96 L. ed. 517, 72 Sup. Ct. 380, 27 A. L. R. (2d) 472 (1952), sustaining the constitutionality of New York's Feinberg Law, the purpose of which is to provide for the disqualification and removal from New York public schools of teachers and other employees who advocate the overthrow of the government by unlawful means or who are members of organizations that advocate such overthrow, the Supreme Court made no reference to the requirement that plaintiffs must have proper standing to raise constitutional questions. Mr. Justice Frankfurter's dissenting opinion took the position that the issues were not ripe for constitutional review and that the four teachers who were plaintiffs had no standing to challenge the statute, relying upon the authority of *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. ed. 754, 67 Sup. Ct. 556 (1947). For a discussion of this aspect of the *Adler* case, see Davis, *Standing, Ripeness and Civil Liberties: A Critique of Adler v. Board of Education*, 38 A. B. A. J. 924 (1952).

7. It is thus apparent from the cases that for one reason or another a person may have no standing in court to raise a constitutional issue, even though the elements of a case or controversy are present. In the language of Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347, 80 L. ed. 688, 711, 56 Sup. Ct. 466 (1936): "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. \* \* \* Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right." This requirement that the petitioner show present or impending injury serves to exclude from the court's consideration objections that are deemed premature, or that are urged by public officials in their official or governmental capacity. Even if an interest is shown, it may be considered too remote, as in *Fairchild v. Hughes*. See generally: Note, *Who May Test the Constitutionality of a Statute in the Supreme Court*, 47 Harv. L. Rev. 677 (1934), 1 *Selected Essays on Constitutional Law* (1938), 609; Note, *The Power of a State Officer to Raise a Constitutional Question*, 33 Col. L. Rev. 1036 (1933), 1 *Selected Essays on Constitutional Law* (1938), 614; Culp, *Methods of Attacking Unconstitutional Legislation*, 22 Va. L. Rev. 723 (1936).

BOOTH FISHERIES CO. v. INDUSTRIAL COMMISSION  
OF WISCONSIN.

Supreme Court of the United States, 1926.  
271 U. S. 208, 70 L. ed. 908, 46 Sup. Ct. 491.

Error to a judgment of the Supreme Court of Wisconsin sustaining an award under the state Workmen's Compensation Act.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a suit begun in the Circuit Court of Dane County, Wisconsin, to review and set aside the findings and award under the Wisconsin Workmen's Compensation Act of a death benefit in favor of Mary McLaughlin as widow of William McLaughlin, against his employer, the Booth Fisheries Company, and that company's surety, the Zurich General Accident & Liability Company.

The petition avers that the Industrial Commission in making the award "acted without and in excess of its powers" in finding that the personal injuries and death of William McLaughlin were proximately caused by accident and not intentionally self-inflicted, and that this finding was contrary to the evidence and contrary to the law. The Circuit Court and the Supreme Court of the State held that the findings of fact by the Commission were supported by evidence, and so were conclusive.

The only question raised on the appeal to the Supreme Court of Wisconsin was the constitutionality under the Fourteenth Amendment of the Workmen's Compensation Act of Wisconsin in its limitation of the judicial review of the findings of fact of the Industrial Commission to cases in which "the findings of fact by the Commission do not support the order or award." Wisconsin Statutes, 1921, § 2394-19. This limitation has been held by the state Supreme Court to mean that the findings of fact made by the Industrial Commission are conclusive, if there is any evidence to support them. \* \* \* It follows that the court may not in its review weigh the evidence or set aside the finding on the ground that it is against the preponderance of the testimony.

It is argued that the employer in a suit for compensation under the Act is entitled under the Fourteenth Amendment to his day in court, and that he does not secure it unless he may submit to a court the question of the preponderance of the evidence on the issues raised.

A complete answer to this claim is found in the elective or voluntary character of the Wisconsin Compensation Act. That Act provides that every employer who has elected to do so shall become subject to the Act, that such election shall be made by filing a written statement with the Commission, which shall subject him to the terms of the law for a year and until July 1st following, and to successive terms of one year unless he withdraws. Wisconsin Stat. § 2394-3, 4, 5. It is conceded by the counsel for the plaintiffs in error that the Act is elective, and that

it is so is shown by the decisions of the Wisconsin court in *Borgnis v. Falk Company*, 147 Wis. 327, 350, and in the present case. 185 Wis. 127. If the employer elects not to accept the provisions of the Compensation Act, he is not bound to respond in a proceeding before the Industrial Commission under the Act, but may await a suit for damages for injuries or wrongful death by the person claiming recovery therefor, and make his defense at law before a court in which the issues of fact and law are to be tried by jury. In view of such an opportunity for choice, the employer who elects to accept the law may not complain that, in the plan for assessing the employer's compensation for injury sustained, there is no particular form of judicial review. This is clearly settled by the decision of this Court in *Hawkins v. Bleakly*, 243 U. S. 210, 216.

More than this, the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. *Daniels v. Tearney*, 102 U. S. 415; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17. \* \* \*

The judgment of the Supreme Court of Wisconsin is

Affirmed.

#### NOTE

1. The doctrine of estoppel operates to prevent a party from raising the constitutional issue as to the invalidity of a statute because of some conduct of his own. The fact that there has been a previous adjudication of unconstitutionality is thus immaterial. In cases where the Supreme Court has recognized the doctrine, receipt of benefits from the statute and invocation of its provisions have been the generally stated criteria, although the court has not always distinguished clearly between them. The cases are discussed in Note, *Estoppel to Contest the Constitutionality of a Statute*, 34 Col. L. Rev. 1495 (1934), 1 Selected Essays on Constitutional Law (1938), 658.

#### MASSACHUSETTS v. MELLON. FROTHINGHAM v. MELLON.

Supreme Court of the United States, 1923.  
262 U. S. 447, 67 L. ed. 1078, 43 Sup. Ct. 597.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were argued and will be considered and disposed of together. The first is an original suit in this Court. The other was brought in the Supreme Court of the District of Columbia. That court dismissed the bill and its decree was affirmed by the District Court of Appeals. Thereupon the case was brought here by appeal. Both cases challenge the constitutionality of the Act of November 23, 1921, c. 135, 42 Stat. 224, commonly called the Maternity Act. Briefly, it provides for an initial appropriation and thereafter annual appropriations for a period of five years, to be apportioned among such of the several states

as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It creates a bureau to administer the act in co-operation with state agencies, which are required to make such reports concerning their operations and expenditures as may be prescribed by the federal bureau. Whenever that bureau shall determine that funds have not been properly expended in respect of any State, payments may be withheld.

It is asserted that these appropriations are for purposes not national, but local to the states, and together with numerous similar appropriations constitute an effective means of inducing the states to yield a portion of their sovereign rights. It is further alleged that the burden of the appropriations provided by this act and similar legislation falls unequally upon the several states, and rests largely upon the industrial states, such as Massachusetts; that the act is a usurpation of power not granted to Congress by the Constitution—an attempted exercise of the power of local self-government reserved to the states by the Tenth Amendment; and that the defendants are proceeding to carry the act into operation. In the Massachusetts case it is alleged that the plaintiff's rights and powers as a sovereign state and the rights of its citizens have been invaded and usurped by these expenditures and acts; and that, although the state has not accepted the act, its constitutional rights are infringed by the passage thereof and the imposition upon the state of an illegal and unconstitutional option either to yield to the federal government a part of its reserved rights or lose the share which it would otherwise be entitled to receive of the moneys appropriated. In the Frothingham case plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions.

In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

First. The State of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the state, and is a usurpation of power, viz.: the power of local self-government reserved to the states.

Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. But we do not rest here. Under Article III, § 2, of the Constitution, the judicial power of this Court extends "to controversies \* \* \* between

a State and citizens of another State" and the Court has original jurisdiction "in all cases \* \* \* in which a State shall be party." The effect of this is not to confer jurisdiction upon the Court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant. \* \* \*

What, then, is the nature of the right of the state here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several states; and that there is imposed upon the states an illegal and unconstitutional option either to yield to the federal government a part of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power. \* \* \*

It follows that in so far as the case depends upon the assertion of a right on the part of the state to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. No rights of the state falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute. \* \* \*

We come next to consider whether the suit may be maintained by the state as the representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do

so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri v. Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

Second. The attack upon the statute in the Frothingham case is, generally, the same, but this plaintiff alleges in addition that she is a taxpayer of the United States; and her contention, though not clear, seems to be that the effect of the appropriation complained of will be to increase the burden of future taxation and thereby take her property without due process of law. The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass *sub silentio* or the determination of it expressly withheld. *Millard v. Roberts*, 202 U. S. 429, 438; *Wilson v. Shaw*, 204 U. S. 24, 31; *Bradfield v. Roberts*, 175 U. S. 291, 295. The case last cited came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield*, 12 App. D. C. 453, 459-460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. *Crampton v. Zabriskie*, 101 U. S. 601, 609. Nevertheless, there are decisions to the contrary. See, for example, *Miller v. Grandy*, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon *Municipal Corporations*, 5th ed., § 1580, et seq. But the relation of a taxpayer of the United States to the federal government is very dif-

ferent. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking

through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

No. 24, Original, dismissed.

No. 962 [Frothingham case] affirmed.

#### NOTES

1. The Alabama Power Company was a private corporation with charter power to manufacture and sell electrical energy throughout the State of Alabama. It brought a bill in the District Court of the United States for the District of Columbia to restrain defendant Ickes, Federal Emergency Administrator of Public Works, from making loans and grants-in-aid from the federal treasury, authorized by act of Congress, to four municipalities in Alabama to help them establish municipally-owned electricity distribution systems in competition with the plaintiff, which had a nonexclusive franchise in each of the four cities to sell electricity. The bill alleged that the loans and grants-in-aid were unconstitutional. Each of the municipalities was authorized by state law to establish and operate its proposed distribution system and to receive the loans and grants-in-aid. On appeal the Court of Appeals for the District of Columbia held that the petitioner had no standing to challenge the constitutionality of the statute or the making of the grants and loans. The Supreme Court affirmed this conclusion and said in support of it that the competition of the cities with the power company, "albeit destructive," being lawful, the use of federal money to bring it about would cause no legal wrong to the company. "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results." *Alabama Power Co. v. Ickes*, 302 U. S. 464, 82 L. ed. 374, 58 Sup. Ct. 300 (1938).

2. A like fate met the suit of several power companies for an injunction brought against the Tennessee Valley Authority to restrain it from generating electricity out of water power created or to be created pursuant to the Tennessee Valley Authority Act and from distributing it and selling it in competition with these private companies. The T. V. A. admitted that damage would result to the companies but contended that it would be "*damnum absque injuria*,"—a damage not consequent upon the violation of any right recognized by law." The court agreed, and held that the companies had no standing to challenge the constitutionality of the statute. The court pointed out that the companies had no exclusive franchises. To the contention that the operations of the T. V. A. violated powers reserved to the states by the Tenth Amendment, the court answered that the states were not objecting, but enacting cooperative legislation. "The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question

under the amendment." *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 83 L. ed. 543, 59 Sup. Ct. 366 (1939).

3. Compare the less stringent rules on standing to sue applied on appeal from the orders of certain federal administrative agencies to a United States Court of Appeals under statutes giving such right of appeal to "any person aggrieved" by administrative orders. Persons "aggrieved" are permitted to bring suit to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons has been or will be invaded. A leading case is *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 86 L. ed. 1229, 62 Sup. Ct. 875 (1942), where the court pointed out that the purpose of the Communications Act of 1934, which gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action, was to protect the public interest in communications. "But these private litigants have standing only as representatives of the public interest \* \* \*. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights." See also *American Power & Light Co. v. Securities & Exchange Commission*, 325 U. S. 385, 89 L. ed. 1683, 65 Sup. Ct. 1254 (1945). For a discussion of the cases see *Associated Industries v. Ickes*, 134 F. (2d) 694 (1943).

4. "It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers." *Stark v. Wickard*, 321 U. S. 288, 304, 88 L. ed. 733, 64 Sup. Ct. 559 (1944). In *Williams v. Riley*, 280 U. S. 78, 74 L. ed. 175, 50 Sup. Ct. 63 (1929) it was held that the fact that he is an owner and operator of an automobile does not give a citizen of a state sufficient interest to induce a federal court to entertain his bill to enjoin collection of a state tax on the sale of gasoline and pass upon his allegation that the tax violates the Fourteenth Amendment to the federal Constitution.

In *Frothingham v. Mellon* the Supreme Court said that the interest of an individual taxpayer is too remote, uncertain and indeterminable to warrant a contest of the validity of an act of Congress. In some states taxpayers' actions are permitted to contest the validity of state statutes appropriating money. For an opinion of a state court discussing the problem and reaching the same conclusion as *Frothingham v. Mellon*, see *Asplund v. Hannett*, 31 N. Mex. 641, 249 Pac. 1074, 58 A. L. R. 573 (1926). The use of taxpayers' actions to enjoin the alleged waste of municipal funds seems to be more generally recognized. See Annotation, 58 A. L. R. 588 (1929); Note, L. R. A. 1915D, 178. See also, generally, Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 Harv. L. Rev. 548 (1923), 3 Selected Essays on Constitutional Law (1938), 565.

### PENNSYLVANIA v. WEST VIRGINIA. OHIO v. WEST VIRGINIA.

Supreme Court of the United States, 1923.  
262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. 658, 32 A. L. R. 300.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.  
These are suits, one by the Commonwealth of Pennsylvania and the other by the State of Ohio, to enjoin the State of West Virginia from

enforcing an act passed by her legislature (c. 71, Acts 1919) which the complainants believe will largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia into their territory and there sold and used for fuel and lighting purposes.

\* \* \* The complainants challenge its validity on the ground that it directly interferes with interstate commerce and therefore contravenes the commerce clause of the Constitution of the United States; and they rest their right to relief on the grounds that to enforce the act will subject them to irreparable injury in respect of many of their public institutions and governmental agencies, which long have been and now are using this gas, and will subject them to further and incalculable injury in that (a) it will imperil the health and comfort of thousands of their people who use the gas in their homes and are largely dependent thereon, and (b) will halt or curtail many industries which seasonably use great quantities of the gas and wherein thousands of persons are employed and millions of taxable wealth are invested. \* \* \*

The act whose enforcement is sought to be enjoined was passed by the legislature of West Virginia February 10, 1919, and went into effect May 11th following. These suits were brought eight days thereafter by direction of the legislatures of the complainant States, and by leave of this Court. Interlocutory injunctions were prayed and granted at the outset and are still in force. \* \* \*

The first question is whether the suits involve a justiciable controversy between States in the sense of the Judiciary Article of the Constitution. We are of opinion that they do and that every element of such a controversy is present.

Each suit presents a direct issue between two States as to whether one may withdraw a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of the other. The complainant State asserts and the defendant State denies that such a withdrawal is an interference with interstate commerce forbidden by the Constitution. This is essentially a judicial question. It concededly is so in suits between private parties, and of course its character is not different in a suit between States.

What is sought is not an abstract ruling on that question, but an injunction against such a withdrawal presently threatened and likely to be productive of great injury. The purpose to withdraw is shown in the enactment of the defendant State before set forth and is about to be carried into effect by her officers acting in her name and at her command. The State is the principal and the action of her officers rightly may be imputed to her, even though a suit for an injunction might lie against them.

The attitude of the complainant States is not that of mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances. Each sues to protect a twofold interest—one as the proprietor of various public institutions and schools whose

supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury.

\* \* \*

The private consumers in each State not only include most of the inhabitants of many urban communities but constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law. \* \* \*

The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.

Turning to the act, we find that by its first section it lays on every pipe line company a positive duty,—to the extent of its supply of gas produced in the State, whether produced by it or others,—to satisfy the needs, whether for domestic, industrial or other use, of all intending consumers, whether old or new, who are willing to pay for the gas and want it for use within the section of the State in which it is produced, in that through which it is transported or in that wherein it is supplied to others. This is a substantive provision whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or to make it obligatory, and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force. It imposes an unconditional and mandatory duty, as counsel for the State admit, and obviously is intended to enforce a preferred recognition and satisfaction of the needs of consumers within the State, present and prospective, regardless of the effect on the interstate stream or on consumers outside the State. \* \* \*

It must be held therefore that the suits were not brought prematurely.

The third question is whether the requisite parties have been brought into the suits. It is objected that the pipe line companies have not been brought in. But there is nothing which makes their presence essential. The complainant States make no complaint and seek no relief against them. They are supplying gas in those States and evidently will continue to do so, if not restrained or prevented by the defendant State.

It is only with her that the complainant States are in controversy. It also is objected that the consumers in the defendant State who will be benefited if the act is enforced have no representation in the suits. But this is a misconception. They are represented by that State, and there is nothing in the situation requiring that they be specially represented or brought in. With equal basis it could be objected in a suit to prevent the enforcement of a statute reducing railroad freight rates, or in one to prevent the enforcement of a municipal ordinance reducing telephone or electric light rates, that shippers or users who would be benefited by the reduction must be specially represented or brought in. Such an objection would of course be untenable; and so of the objection here. [The statute was held to violate the commerce clause and its enforcement enjoined.]

MR. JUSTICE BRANDEIS, dissenting. \* \* \*

First. This Court is without jurisdiction of the subject-matter.

The bills present neither a "case," nor a "controversy," within the meaning of the Federal Constitution. *Marbury v. Madison*, 1 Cr. 137; *Muskraat v. United States*, 219 U. S. 346, 356, 359; *Texas v. Interstate Commerce Commission*, 258 U. S. 158. They are not proceedings "instituted according to the regular course of judicial procedure" to protect some right of property or personal right. They are, like *McChord v. Louisville & Nashville R. R. Co.*, 183 U. S. 483, 495, an attempt to enjoin, not executive action, but legislation. They are instituted frankly to secure from this Court a general declaration that the West Virginia Act of February 17, 1919, is unconstitutional. Compare *Giles v. Harris*, 189 U. S. 475, 486. The well settled rule that the Court is without power to entertain such a proceeding applies equally, whether the party invoking its aid is a State or a private person. And the rule cannot be overcome by giving to pleadings the form of a bill in equity for an injunction. Compare *Fairchild v. Hughes*, 258 U. S. 126; *Atherton Mills v. Johnston*, 259 U. S. 13, 15; *Texas v. Interstate Commerce Commission*, supra.

Moreover, it is not shown that there is, in a legal sense, danger of invasion of the alleged rights. It is shown that the States of Pennsylvania and Ohio are, in their public institutions, themselves consumers of West Virginia gas—a "makeweight" as suggested in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237. And it is shown that these and many other consumers within the plaintiff States would suffer serious injury if the West Virginia supply were cut off. But it is not shown that discontinuance of the supply is threatened or that there is, in a legal sense, danger that the supply will be stopped. The mere enactment of the statute, obviously, does not constitute a threat to interrupt the flow of gas into the plaintiff States. The importation into Ohio and Pennsylvania is conducted, not by the State of West Virginia, but wholly by twelve privately owned public service corporations. If the importation ceases it will be, primarily at least, because of acts or omis-

sions of these twelve corporations. Yet there is not even an allegation that these corporations threaten, or intend, to discontinue the importation; or that they will be compelled to do so unless the State of West Virginia is enjoined from enforcing the statute. \* \* \*

MR. JUSTICE HOLMES. \* \* \*

I agree substantially with my brothers McREYNOLDS and BRANDEIS, but think that there is jurisdiction in such sense as to justify a statement of my opinion upon the merits of the case. I think that the bill should be dismissed.

MR. JUSTICE McREYNOLDS, dissenting.

It seems to me quite clear that the record presents no justiciable controversy; certainly none within the original jurisdiction of this Court.  
\* \* \*

#### NOTES

1. Assuming that the opinion of the Court in the principal case is correct in holding that the facts present a real case or controversy, is it a situation where declaratory relief would have been appropriate? If a similar case arose today, would a declaratory judgment be sought as regards the issue of the constitutionality of the statute?

2. In *Missouri v. Holland*, 252 U. S. 416, 64 L. ed. 641, 40 Sup. Ct. 382, 11 A. L. R. 984 (1920), Missouri asserted its quasi-sovereign right to regulate the taking of wild birds within its borders and also, in its own behalf, alleged a pecuniary interest as owner of the birds. It brought a bill in equity to prevent the enforcement of the federal Migratory Bird Treaty Act of 1918, alleging it to be an unconstitutional interference with the rights reserved to the states by the Tenth Amendment. The court said that "it is enough that the bill is a reasonable and proper means to assert the alleged quasi-sovereign rights of a state."

3. The State of Georgia moved for leave to file a bill of complaint and sought to invoke the original jurisdiction of the Supreme Court in a suit against some twenty railroads, charging a conspiracy among the defendants in restraint of trade and commerce among the states in respect of the fixing of arbitrary and noncompetitive rates for transportation of freight. She alleged that the effect of the conspiracy was to give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia. The court (Chief Justice Stone and Justices Roberts, Frankfurter and Jackson dissenting) granted the motion, holding that Georgia had properly invoked the original jurisdiction of the Supreme Court. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 89 L. ed. 1051, 65 Sup. Ct. 716 (1945).

4. In *Florida v. Mellon*, 273 U. S. 12, 71 L. ed. 511, 47 Sup. Ct. 265 (1927) the state instituted an original proceeding in the Supreme Court to test the constitutionality of a provision of the federal Revenue Act of 1926 which imposed a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 per cent, for the amount of any estate, inheritance, legacy or succession taxes actually paid to any state or territory. The state sought leave to file a bill to enjoin the collection of taxes on estates of Florida decedents. Florida was one of the few states that levied no inheritance or estate tax, being forbidden to do so by her Constitution. Consequently, she was unable to place her citizens on an equality with those of other states in respect of the challenged tax. The Supreme Court denied Florida leave to file the bill of complaint, saying in part: "The claim of immediate injury to the state rests upon the allegation that the act will have the result of inducing

potential taxpayers to withdraw property from the state, thereby diminishing the subjects upon which the state power of taxation may operate. The averment to that effect, however, affords no basis for relief, because, not only is the state's right of taxation subordinate to that of the general government, but the anticipated result is purely speculative, and, at the most, only remote and indirect. \* \* \* Plainly, there is no substance in the contention that the state has sustained, or is immediately in danger of sustaining, any *direct* injury as the result of the enforcement of the act in question."

5. In *Massachusetts v. Missouri*, 308 U. S. 1, 84 L. ed. 3, 60 Sup. Ct. 39 (1939) the Commonwealth of Massachusetts sought leave to file a bill of complaint in the Supreme Court against the State of Missouri to determine whether, under reciprocal provisions of the tax laws of the defendant state, the complainant state was the one which could levy a succession, transfer or inheritance tax in respect of a trust created by a deceased resident but having a situs in the defendant state. In denying Massachusetts leave to file the bill of complaint the court said: "The proposed bill of complaint does not present a justiciable controversy between the States. To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. \* \* \* Missouri, in claiming a right to recover taxes from the respondent trustees, or in taking proceedings for collection, is not injuring Massachusetts. By the allegations, the property held in Missouri is amply sufficient to answer the claims of both States and recovery by either does not impair the exercise of any right the other may have. It is not shown that there is danger of the depletion of a fund or estate at the expense of the complainant's interest. It is not shown that the tax claims of the two States are mutually exclusive. On the contrary, the validity of each claim is wholly independent of that of the other and, in the light of our recent decisions, may constitutionally be pressed by each State without conflict in point of fact or law with the decision of the other."

### McCHORD v. LOUISVILLE & NASHVILLE R. CO.

Supreme Court of the United States, 1902.

183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. 165.

These are appeals from the final decrees of the Circuit Court of the United States for the District of Kentucky, perpetually enjoining Charles C. McChord and others, railroad commissioners of the State of Kentucky, from doing any of the things required by, or from taking any action whatever against complainants under a certain act of the general assembly of the Commonwealth of Kentucky, approved March 10, 1900, c. 2, \* \* \*

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the Court.

By the decrees the Railroad Commission of the Commonwealth of Kentucky was permanently restrained from proceeding under the act of March 10, 1900, which was alleged and held to be unconstitutional.

Conceding that the mere fact that a duly enacted law is unconstitutional does not entitle a party to relief by injunction against

proceedings in compliance therewith, it is contended that ground of equity jurisdiction existed here in the want of adequate remedy by the ordinary processes of law for the threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury. \* \* \*

The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction. \* \* \*

In *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 472, the general rule was stated and applied, and Mr. Justice Harlan, who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and, by injunction to prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks."

The rule was also applied by Mr. Justice Field in *Alpers v. San Francisco*, 32 Fed. Rep. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. \* \* \* The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." \* \* \*

The result of these considerations is that the duty of enforcing its rates rests on the commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all. Whether after they are determined

their enforcement can be restrained is a question not arising for decision on this record, and we are not called on to dispose of other contentions of grave importance, which were pressed in argument, as if now requiring adjudication.

Decrees reversed and cases remanded to the Circuit Court with a direction to sustain the demurrers and dismiss the bills.

#### NOTES

1. The principle of the separation of governmental powers operates to limit the judicial branch in its relations with the legislative and executive departments. No court will attempt to exert its power to enjoin a legislative body from enacting a proposed measure into law nor compel it to perform duties imposed upon it by the constitution. The legislative responsibility is political in character and a court would have no practicable means of enforcing its order.

"Being a co-ordinate branch of the state government, distinct from and independent of the judiciary, it is unquestionably true that the legislature is not amenable to the courts. They have no power to interfere in any manner with the proceedings of either of its component branches, or with the action of their respective clerks in making up the journals of their proceedings, so long as they are acting in obedience to the will of those bodies. This proposition is self-evident, otherwise the judiciary would be superior to the legislative branch of the government." *Fox v. Harris*, 79 W. Va. 419, 423, 91 S. E. 209 (1916).

2. There is some divergence of view as to whether the rate-making function is legislative or judicial. In *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. 67 (1908) the Supreme Court reasserted the view that the fixing of rates by a state administrative body is a legislative act. Two leading decisions sustaining state statutes which vested rate-making functions in state courts are *In re Janvrin*, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319 (1899), and *People ex rel. Central Park, N. & E. R. R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909). The weight of authority seems to support the view that the function is legislative. It is, however, generally recognized that to determine whether existing or prescribed rates are unreasonable or confiscatory is a judicial function. The cases are discussed in Note, 8 L. R. A. (N. S.) 529 (1907).

3. In many cases the enforcement of rates fixed by state commissions has been enjoined by a federal court when the rates have been found by the court to be so low as to be "confiscatory" and therefore in violation of the due process of law clause of the Fourteenth Amendment to the federal Constitution,—that is, the executive or administrative, not the legislative, action of the commissions has been enjoined. "The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, 38 L. ed. 1014, 14 Sup. Ct. 1047, was a case not of an unconstitutional statute, but of confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. \* \* \* In *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78, 28 Sup. Ct. 7, 12 Ann. Cas. 757, the court upheld the right of action in a federal court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the Fourteenth Amendment." *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 507, 61 L. ed. 1280, 37 Sup. Ct. 673 (1917).

In recent decisions the Supreme Court has given evidence of its disinclination to interfere with the state rate-making process. At all events, it is much less

likely today to hold that a rate fixed by a state commission is confiscatory than it was during the earlier years of this century. See *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. ed. 1037, 62 Sup. Ct. 736 (1942); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. ed. 333, 64 Sup. Ct. 281 (1944). Also, the Johnson Act (28 U. S. C. § 1342) provides that federal district courts shall not enjoin the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political subdivision, where jurisdiction is based solely on diversity of citizenship or repugnance of the order to the federal Constitution, and the order does not interfere with interstate commerce, has been made after reasonable notice and hearing, and a plain, speedy and efficient remedy may be had in the state courts.

### EX PARTE YOUNG.

Supreme Court of the United States, 1908.

209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441, 13 L. R. A. (N. S.) 932.

[The case turned upon the question whether the United States Circuit (now District) Court had jurisdiction of a bill to enjoin the Attorney General and the Railroad and Warehouse Commission, of the State of Minnesota, from enforcing against the Northern Pacific Railway a state statute which provided for the regulation of railroad rates in a manner alleged to be unconstitutional. The bill was filed the day before the legislation was to take effect. The decision of the Circuit Court that it had jurisdiction was affirmed in the following opinion:]

MR. JUSTICE PECKHAM delivered the opinion of the Court. \* \* \*

This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the state. \* \* \* The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign State. \* \* \* It applies to a suit brought against a state by one of its own citizens as well as to a suit brought by a citizen of another state. *Hans v. Louisiana*, 134 U. S. 1. \* \* \* *Osborn v. United States Bank* (1824), 9 Wheat. 738, 846, 857, \* \* \* held that the Amendment applied only to those suits in which the state was a party, on the record. In the subsequent case of *Governor of Georgia v. Madrazo* (1828), 1 Pet. 110, 122, 123, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn v. United States Bank*, supra, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys

in the treasury of the state and for slaves in possession of the state government), the state might be considered as the party on the record and therefore the suit could not be maintained. \* \* \*

The cases upon the subject were reviewed, and it was held, In re Ayers, 123 U. S. 443, that a bill in equity brought against officers of a state, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the state, where the relief prayed for, if done, would constitute a performance by the state of the alleged contract of the state, was a suit against the state, following in this respect *Hagood v. Southern*, supra. [117 U. S. 52, 67.]

A suit of such a nature was simply an attempt to make the state itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The state alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the state.

On the other hand, *United States v. Lee*, 106 U. S. 196, determined that an individual in possession of real estate under the Government of the United States, which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also *Tindal v. Wesley*, 167 U. S. 204, to the same effect. \* \* \*

The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a Federal court of equity from such action.

\* \* \*

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

\* \* \*

It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the state in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the

State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *In re Ayres*, *supra*, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the federal Constitution be first raised in a federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts. \* \* \*

It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. \* \* \* Another obstacle to making the test on the part of the company might be to find an agent or employee who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. \* \* \* If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. \* \* \*

To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review

in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less. The courts having jurisdiction, federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.

[Mr. JUSTICE HARLAN delivered a dissenting opinion.]

#### NOTES

1. If the attempted enforcement of the Minnesota statute by Mr. Young, the Attorney-General, was not state action since Mr. Young was merely an individual wrongdoer, how could the Supreme Court hold, as it did, that the State of Minnesota had denied due process of law to the railroad company? The due process clause of the Fourteenth Amendment to the Constitution of the United States is directed only toward state action. *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. 18 (1883). In *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. 312 (1913) the Supreme Court, rejected the contention that the Fourteenth Amendment "deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated."

2. If a taxpayer sues a state treasurer to recover a tax which he alleges has been illegally collected by the state, is this a suit against the state? *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. 919 (1900) was an action brought against the state treasurer of California in his official capacity by the receiver of a railroad corporation to compel the state, through him, to perform its promise to return to taxpayers money alleged to have been taken under an illegal assessment. The Supreme Court said that this was in substance an action against the state itself, within the meaning of the Eleventh Amendment. In other words, whether a suit is one against a state is determined not by the names of the parties to the action but by the essential nature and effect of the proceeding as they appear from the entire record.

3. In his dissenting opinion in *Ex parte Young* Mr. Justice Harlan argued that where the question at issue is the constitutionality of a state statute the Attorney-General of a state should not be considered an individual wrongdoer in bringing suit on behalf of the state in its own courts to test the statute. If the state court decides the federal questions wrongly, its decision can of course be corrected by carrying the case to the Supreme Court of the United States. If the Attorney-General is doing no individual wrong in bringing suit on behalf of his state, any attempt to control his purely official acts is in effect an effort to prevent the state from acting, that is, to prevent the state from securing a determination of the validity of its own laws in its own courts. He thought the framers of the Eleventh Amendment "would have been amazed" by the court's decision.

4. A bill was filed in the United States circuit court for the eastern district of Arkansas by a telegraph company asking that the prosecuting attorneys of the

seventeen judicial districts of the State of Arkansas be enjoined from instituting proceedings to enforce against the company the penal provisions of the Arkansas statute alleged to be in violation of the federal Constitution. The court decreed dismissal of the bill, asserting that this was a suit against the state and therefore not within the court's jurisdiction. On the authority of the principal case the Supreme Court reversed the decree. *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. 286 (1910).

5. Six wholesalers and retailers in Florida on behalf of themselves and all others similarly situated joined in a suit to test the validity of a Florida statute which required all merchants who offered trading stamps with goods to pay license fees and made violation of the statute a criminal offense. They alleged that the statute was unconstitutional, that its enforcement was threatened, and if it materialized would injure their business. They sought an injunction to restrain "the tax collectors of each county in the state, the different state's attorneys, county solicitors and prosecuting attorneys of the circuits and counties of the State of Florida." The federal District Court took jurisdiction, held the statute invalid and granted the injunction. On appeal the Supreme Court concurred in the view that the District Court had jurisdiction but reversed on the ground that the statute was valid. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. 370 (1916).

6. On the ground of threatened injury to business, a sugar refining company obtained a decision that a statute complained of was unconstitutional and an injunction restraining the inspector of sugar refining, the Governor and the Attorney-General of Louisiana. This decree of the United States District Court was affirmed by the Supreme Court. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. 498 (1916).

7. *Tyson & Bro.—United Theatre Ticket Officers v. Banton*, 273 U. S. 418, 71 L. ed. 718, 47 Sup. Ct. 426, 58 A. L. R. 1236 (1927) was an appeal from a decree of a federal district court denying a temporary injunction in a suit brought by appellant, a licensed ticket-broker corporation in New York, to restrain the District Attorney of New York County and the State Comptroller from forfeiting its license and prosecuting criminal proceedings, under the state law, because of appellant's failure to conform to a provision thereof limiting the price at which it could resell a theatre ticket to fifty cents in advance of the box-office price. The bill alleged that the terms of the statute were so drastic and the penalties for its violation so great that appellant would be compelled to submit to the statute whether valid or invalid unless its suit be entertained, and thereby would be deprived of its property without due process of law. The Supreme Court said that "equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." It then held the statute invalid as a violation of the Fourteenth Amendment and reversed the decree of the lower court.

8. See Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation*, 50 Harv. L. Rev. 956 (1937), 1 Selected Essays on Constitutional Law (1938), 626.

### CAVANAUGH v. LOONEY.

Supreme Court of the United States, 1919.  
248 U. S. 453, 63 L. ed. 354, 39 Sup. Ct. 142.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The University of Texas is a state institution under immediate control of officers known as Regents, appointed by the Governor, with

its principal educational departments in Travis and Galveston counties. An act of the legislature, approved August 30, 1911 (S. B. No. 20, c. 6, General Laws, Texas), undertook to authorize the Regents to purchase or condemn through proceedings in the district courts such lands within those counties as they might deem expedient for extension of campus or other university purposes. Appellants have long owned and used as a residence homestead twenty-six acres in Travis County desirable as an addition to the university grounds. Having failed in their efforts to purchase, the Regents were about to meet and ask the Attorney General to institute proceedings to condemn this entire tract. Thereupon appellants instituted this proceeding against them and the Attorney General in the United States District Court seeking to restrain their threatened action "on the ground among others that said law conflicts with the Constitution of the United States, \* \* \*."

A special court [of three judges] assembled as provided by § 266 Judicial Code, denied application for preliminary injunction without opinion and allowed this direct appeal.

It is now settled doctrine "that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action." *Ex parte Young*, 209 U. S. 123, 155, 156; [other citations are omitted]. But no such injunction "ought to be granted unless in a case reasonably free from doubt," and when necessary to prevent great and irreparable injury. *Ex parte Young*, *supra*, 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.

When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegation of threatened "irreparable loss and damage" appears fanciful. The detailed circumstances negative such view and rather tend to support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a federal right the appropriate and adequate remedy by review here is obvious. Exercising a wise discretion we think the court below properly denied an injunction. Upon the record it was not called upon to inquire narrowly into the disputable points urged against the statute. No more are we.

The judgment of the court below is

Affirmed.

## NOTES

1. In *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 79 L. ed. 1322, 55 Sup. Ct. 678 (1935) the motor sales company brought a bill in the United States District Court to enjoin the District Attorney of New York County from instituting a criminal prosecution for alleged violation of the Code of Fair Competition for the motor vehicle trade, a misdemeanor by a New York statute which plaintiff alleged to be unconstitutional under the Fourteenth Amendment. The charge of violation of the code related to the provisions which limited the amount to be allowed for an old car traded in as part payment for a new car and required the maintenance of factory list prices, plus certain charges, with a prohibition against giving discounts or gratuities to induce purchases. The district court dismissed the bill, and on appeal the Supreme Court affirmed the dismissal. Mr. Chief Justice Hughes, for the court, said in part: "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. \* \* \* To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. \* \* \* Aside from the statement of general and unsupported conclusions, the case presented by the bill was the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights. So far as the bill disclosed, nothing more than a single prosecution was in contemplation, a point which the District Attorney emphasized by his disclaimer, on the hearing below, of any intention to institute any further prosecution against appellant until his rights, constitutional or otherwise, had been adjudicated in the pending criminal proceeding." See also *Douglas v. Jeannette*, 319 U. S. 157, 87 L. ed. 1324, 63 Sup. Ct. 877 (1943), where the Supreme Court, through Mr. Chief Justice Stone, emphasized the view expressed in the *Spielman* case.

2. The doctrine of *Ex parte Young* that a state officer who seeks to enforce an unconstitutional statute is thereby "stripped of his official or representative character" and becomes a mere individual wrongdoer subject to restraint by a federal court is sometimes referred to as the "stripping doctrine." Its ostensible justification is that a state is not entitled to erect an unfair barrier—either through the imposition of severe penalties or some other method—to a litigant's attempt to obtain a judicial determination of the validity of legislation which is about to be enforced against him and which adversely affects his property rights. But even where the elements are present to make the "stripping doctrine" applicable, the plaintiff must make an adequate showing of threatened irreparable injury in order to satisfy the requirements for injunctive relief. *Cavanaugh v. Looney* and subsequent cases clearly evidence a tightening of this requirement and show that the Supreme Court has become more insistent upon "exceptional circumstances" and "exceptional and irreparable injury" in order to sustain a "stripping doctrine" suit.

3. One of the main sources of dissatisfaction with the decision of *Ex parte Young* lay in the fact that it sanctioned a practice whereby a single federal judge, virtually without notice and in an *ex parte* proceeding, could restrain the enforcement by a state official or a state administrative agency of a state statute. In an effort to deal with this aspect of the problem, Congress in 1910 wrote into the law the mandatory requirement of a three-judge federal District Court where either an interlocutory or permanent injunction is sought restraining the enforcement, operation or execution of any state statute by a state officer, or of an order made by an administrative board or commission acting under state statutes, in cases where such relief is sought upon the ground of the unconstitutionality of such statute. (For the present form of this provision see 28 U. S. C. §§ 2281, 2284.) Provision is made for the expeditious handling of such cases by permitting direct appeal to the Supreme Court of the United States from the order granting or denying the interlocutory or permanent injunction. (28 U. S. C. § 1253.)

Federal interference with the state rate-making process was further curtailed in 1934 by the Johnson Act (28 U. S. C. § 1342), which deprives United States district courts of substantially all jurisdiction to enjoin the enforcement of public utility rates fixed by state administrative agencies or rate-making bodies where a plain, speedy and efficient remedy may be had in the state courts. See Note, Limitation of Lower Federal Court Jurisdiction Over Public Utility Rate Cases, 44 Yale L. J. 119 (1934), 4 Selected Essays on Constitutional Law (1938), 1196; Heineman and Vail, The Johnson Act, 30 Ill. L. Rev. 215 (1935).

4. In *California v. Latimer*, 305 U. S. 255, 83 L. ed. 159, 59 Sup. Ct. 166 (1938), California sued in a federal court to enjoin certain federal officers from enforcing against its state-owned State Belt Railroad two federal statutes under which if valid the railroad was required to pay a federal tax as a contribution to a federal fund out of which aged employees of this and other railroads engaged in interstate commerce were to be paid federal pensions, alleging that these statutes were constitutionally inapplicable to the State Belt Railroad. The Supreme Court held that the bill should be dismissed without deciding the constitutional question. Under the federal tax laws the taxpayer after payment may sue to recover the payment and in that suit test the validity of the tax. Such a suit for a refund could not be brought until six months after payment, but the court said that tying up the state's money for that length of time did not constitute a "special circumstance" of irreparable injury within the rule. "For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested."

### Section 3.—The Effect of Unconstitutionality.

#### NORTON v. SHELBY COUNTY.

Supreme Court of the United States, 1886.  
118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. 1121.

[A Tennessee statute purported to alter the county government of Shelby county by substituting a board of commissioners in lieu of the existing governing board called the "County Court" which was composed of elected justices of the peace. The statute purported to confer all the powers of the County Court upon the commissioners, including its power to issue county bonds in exchange for shares in a railway company, as an aid to the construction of the road. Within a month after the enactment of the statute the justices of the peace brought suit in an inferior state court to test its validity and from a judgment against them they appealed to the state supreme court. Pending this appeal the commissioners issued the bonds in question, in conformity with the statute. On the appeal the state supreme court held the statute invalid, that the old County Court was recognized in the state constitution and could not be supplanted by the legislature. A few years later Norton brought suit on some of the bonds in a Circuit Court of the United States which gave judgment for the county. On writ of error:]

MR. JUSTICE FIELD delivered the opinion of the Court. \* \* \*

But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. \* \* \*

It remains to consider whether the action of the commissioners in subscribing for stock of the Mississippi River Railroad Company and issuing the bonds, of which those in suit are a part, being originally invalid, was afterwards ratified by the county. \* \* \*

It is unnecessary to pursue this subject further. We are satisfied that none of the positions taken by the plaintiff can be sustained. The

original invalidity of the acts of the commissioners has never been subsequently cured. It may be, as alleged, that the stock of the railroad company, for which they subscribed, is still held by the county. If so, the county may, by proper proceedings, be required to surrender it to the company, or to pay its value; for, independently of all restrictions upon municipal corporations, there is a rule of justice that must control them as it controls individuals. If they obtain the property of others without right, they must return it to the true owners, or pay for its value. But questions of that nature do not arise in this case. Here it is simply a question as to the validity of the bonds in suit, and as that cannot be sustained, the judgment below must be

Affirmed.

### NOTE

1. The view of the principal case that a statute held to be unconstitutional is without legal force and effect from the time of its enactment, or void ab initio, has been applied in many cases which have imposed civil liability upon public officers who have taken official action in reliance on such statute. *E.g.*, *Campbell v. Sherman*, 35 Wis. 103 (1874); *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49 (1888); *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718 (1875).

### STATE v. GODWIN.

Supreme Court of North Carolina, 1898.  
123 N. Car. 697, 31 S. E. 221.

MONTGOMERY, J.: The defendants were justices of the peace and by virtue of their office (Code, Section 2014) were a board of supervisors and were required to look after the public roads in their townships. They were required also (Code, Section 2015) to hold stated meetings for the purpose of consulting on the condition of the roads, and, by Section 2024 of The Code, to make to the Superior Court at term time an annual report of the condition of the roads. The General Assembly of 1897 in Chapter 514 undertook to repeal the provisions of The Code, above referred to, as to Hertford County, and to impose upon others the duties required of the defendants. The defendants after the enactment of Act of 1897, failed and refused to discharge the duties enjoined upon them under the provisions of the former law (The Code) and they were indicted on account of such failure and refusal. The Act of 1897, in its entirety, is contrary to the provisions of our State Constitution and is therefore void.

\* \* \*

The question for decision then is, is one who is a public officer under a former provision of law compelled under pain of indictment and punishment to perform the duties of the office during the time when there was on the statute books a subsequent [repealing] act unconstitutional in all its provisions? The matter is an important one both to the public and to the individual. With us, public

office is a public trust and public officers are merely the agents of the people. \* \* \* What an anomalous state of things would we have then, if a person believing himself to be a public officer, because of the discharge of the duties which he thought he owed to the public, should afterwards be indicted and punished because the courts had held the act, which created the office and prescribed its duties, to be against the provisions of the constitution and void. Such a proposition would be equivalent to declaring that the individual office holder must be wiser than the whole people represented in their general assembly. Such a proposition to us seems opposed to every idea of justice. It could not be true. The criminal law cannot be invoked to punish one who acts as a public officer—as an agent of the people—and who in the discharge of a public duty had obeyed an act of the law-making power even though the law be unconstitutional, unless the act itself had required the committal of a crime—a thought which could not be entertained for a moment. And it makes no difference that in the case before the court the defendants are indicted for a *refusal* to perform certain duties under a former law attempted to be repealed by a subsequent unconstitutional statute and not for doing positive acts under an unconstitutional law. The principle is the same in both cases. The defendants here cannot be punished under the criminal law for failing and refusing to perform the duties of an office which office and the duties pertaining to it had been sought to be repealed by a subsequent act of the legislature, afterwards declared by the courts to be unconstitutional. Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government had a right to presume that the law-making power had acted within the bounds of the constitution, and their highest duty was to obey.

It is not necessary, to a proper determination of this case, to go into the realm of the effect of contracts, executed or executory, made by a person claiming to be a public officer, but where there is no lawfully created office. The counsel for the prosecution cited to the court, in support of his position, the case of *Norton v. Shelby Co.*, 118 U. S. 425, and especially to that portion of the opinion wherein it was declared by the court that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed." The opinion in that case was rendered upon the effect of an executory contract made by one who claimed to be a public officer, the office having been created without authority of law. For the reasons given in this opinion, the case of *Norton v. Shelby Co.*, *supra*, does not apply to the facts in this case. Upon the special verdict the judgment of the court below was that the defendants were not guilty, and the judgment is affirmed.

Affirmed.

## NOTES

1. The principal case is representative of the view that it is unjust to subject public officers to civil or criminal liability for acts done in reliance upon statutes subsequently held to be unconstitutional or for refusing to act under statutes apparently repealed by statutes subsequently held to be unconstitutional. See also *Henke v. McCord*, 55 Iowa 378, 7 N. W. 623 (1880); *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. 137 (1891); *Bohri v. Barnett*, 144 Fed. 389 (1906).

A judgment which results from applying as the law of the case an unconstitutional statute is at worst an erroneous judgment, but it is not a "void" judgment if the court's jurisdiction of the case does not depend upon the statute. *Brandhoefer v. Bain*, 45 Nebr. 781, 64 N. W. 213 (1895). For instances in which justices of the peace acted wholly without jurisdiction see *Heller v. Clarke*, 121 Wis. 71, 98 N. W. 952 (1904); *De Courcey v. Cox*, 94 Cal. 665, 30 Pac. 95 (1892).

2. Individuals who have relied upon the decision of the highest court of a state as to the constitutionality of a statute have sometimes been protected from the legal consequences of their conduct in the event of a subsequent decision of the same court declaring its prior adjudication erroneous. *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912B, 691 (1910). Cf. *State v. Striggles*, 202 Iowa 1318, 210 N. W. 137 (1926), where it was held that defendant could not rely upon the decision of an inferior state court to justify his act.

3. The principle of *State v. O'Neil* has been applied to decisions of an administrative agency with respect to statutory construction. Thus where a private person without a permit sold securities of a kind that a state statute, when subsequently construed by a court, required a permit be previously obtained from the corporation commissioner of the state, he was held not criminally responsible because, before selling the certificates, he was advised by the commissioner that no permit was required for selling the kind he sold. *People v. Ferguson*, 134 Cal. App. 41, 24 Pac. (2d) 965 (1933).

4. A state statute of 1925 fixed a speed limit of 30 miles per hour. An act of 1929 "was generally taken to have repealed the former law." Defendant in 1930, while driving a little in excess of 30 miles per hour, caused the death of another and was convicted of involuntary manslaughter on the ground of criminal negligence predicated on his violation of the act of 1925. On appeal the State Supreme Court held the repealing act unconstitutional and regarded it as not therefore repealing the act of 1925, but also exonerated the defendant on the ground that he relied upon the repealing act. *Claybrook v. State*, 164 Tenn. 440, 51 S. W. (2d) 499 (1932), noted in 17 Minn. L. Rev. 322 (1933).

5. A state statute made dentists' licenses revocable for specified misconduct. After the Circuit Court of the circuit in which a dentist resided had held the statute unconstitutional, a dentist did some of the forbidden acts. Subsequently the state Supreme Court held the statute valid, but also held that the dentist's license could not be revoked for the intervening acts. *State ex rel. Williams v. Whitman*, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A. L. R. 1416 (1934). Note that here the power to adjudicate revocation of licenses was lodged in an administrative board. The Supreme Court held in effect that this board was bound by the Supreme Court's rule that the license could not be revoked for intervening acts.

6. So far as the Constitution of the United States is concerned, a state court has freedom of choice either to give retroactive effect to any decision by it that overrules a former decision or to give such a decision prospective effect only, if it chooses that alternative. In *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 364-365, 77 L. ed. 360, 366-367, 53 Sup. Ct. 145, 85 A. L. R. 254 (1932), Mr. Justice Cardozo, speaking for the Court, said: "A

state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. \* \* \* On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. \* \* \*

### STATE v. GARDNER.

Supreme Court of Ohio, 1896.

54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660.

BRADBURY, J. At the September term of the Court of Common Pleas of Summit County, Omar N. Gardner was indicted for offering a bribe to Joseph Hugill, a city commissioner of the city of Akron. The accused demurred to the indictment on the ground that the act of April 20, 1893, under which Hugill was performing the duties of his office, was unconstitutional and void. The demurrer was sustained and the defendant discharged. To this holding of the court the prosecuting attorney excepted, and, by virtue of the provisions of sections 7305, 7306, 7307 and 7308 of the Revised Statutes, has brought the question to this court for review. Two questions are presented by the record: First, whether the act of April 20, 1893, which provides a municipal government for the city of Akron, is unconstitutional or not, and second, if unconstitutional, whether its constitutionality may be assailed in the collateral way undertaken by the accused. The first question which logically arises is the latter of the two; for if the accused should not be allowed to raise the question, in the way he attempted, it follows that the constitutionality of the act which created the office was not before the court. Whether an act of the general assembly creating an office and providing a method for filling it may be collaterally attacked, is a question of the utmost importance in the practical administration of governmental affairs. Different courts have decided the question differently. *Leach v. The People*, 122 Ill. 420; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472; *Coyle v. Com.*, 104 Pa. St. 117; *Mechem on Pub. Off.*, §§ 318, 327; *Van Fleet on Collateral Attack*, § 21, p. 33; *Norton v. Shelby County*, 118 U. S. 425; *Hildreth v. McIntire*, 1 J. J. Marsh 206.

It is now before this court for the first time, and while we are not insensible to the consideration justly due to the high standing of those courts and authors we are bound to reach that conclusion which, in our judgment, is best sustained by sound reason; and that best comports with an enlightened public policy and the maintenance of public order.

If the official acts of officers acting in an office created by an unconstitutional statute should be regarded as falling within the prin-

ciple that sustains the act of de facto officers until the statute has been held unconstitutional by competent judicial authority in a proceeding appropriate to that end, all difficulty vanishes. The opposite doctrine is based upon the assertion that there can be no de facto officer unless there is a de jure office. That is a simple and summary way to dispose of this grave question. That there can be no de jure officer without a de jure office is a proposition to which all minds will, of course, assent. But that there can [not] be a de facto officer without a de jure office is disputable if the phrase "de facto officer" includes one who in fact discharges the duties of a public office, recognized by the great body of the people and by virtue of a statute solemnly passed by the general assembly of the state, which may be unconstitutional. That there have been many officers who occupied and discharged the duties of offices created by laws that were afterwards held unconstitutional is a fact well known to every one. While in such occupancy innumerable official acts affecting both public and private rights may have been actually performed by them, the duration of the office may, and often does, extend through a series of years. In the case before us the act in question is one creating a municipal government for the city of Akron, and has been in force since its enactment in April, 1893. It superseded an act passed in the year 1891 for the government of that city, which latter act was subject to the same assault that was attempted to be made on the one under consideration. The existing government of the populous and thriving city of Youngstown also rests upon the act now assailed; while that of the city of Springfield depends upon an act, at least as vulnerable to the same attack as the act under consideration. The constitutionality of the governments of the cities of Springfield and Youngstown has not been assailed, even collaterally, and may continue unchallenged for many years. The officers who in these cities occupy offices created by the acts upon which the city government rests, are daily discharging duties affecting the rights of the city, and the private rights of individuals. These officers are either usurpers and trespassers, or de facto officers; if the latter, the rights of the public, or of individuals who have submitted to their authority, or acquiesced in its exercise, would be unaffected by a subsequent authoritative judicial declaration that the statute was unconstitutional; if they were usurpers merely every official act would be a nullity, and interminable confusion possibly follow such a decision. Were such results to follow, the courts might well pause, before declaring unconstitutional an act establishing a city government, unless its constitutionality was challenged upon the threshold of its existence.

The common law in relation to de facto officers had its origin in England. It was there laid upon a foundation as broad as their necessities required. Such a thing as a written constitution controlling legislative action was unknown to their jurisprudence; whatever office

parliament chose to create was a *de jure* office. In the states of the American Union, however, we find written constitutions, limiting the otherwise absolute power of the people to act through the legislative branch of the government. As a consequence of this peculiar feature of our government, a statute, regularly enacted by the legislative branch thereof may, in express terms, create a public office, or it may authorize a municipal corporation to create one; an incumbent may be appointed in the mode prescribed by the statute. He may qualify, enter upon the discharge of the duties of the office, and continue to discharge those duties indefinitely—possibly for many years—during which he daily performs official acts affecting not only public rights, but private rights of the most sacred character. After all this has occurred, the constitutionality of the statute is successfully challenged, and the statute declared void, and for the first time in the history of the common law its principles must be invoked to ascertain the status of the rights of persons, and of the public, that accrued before the law was declared void.

We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called "*de facto* officers." They actually performed official acts authorized by a statute solemnly enacted by the law making department of the government. Such a statute is presumed to be constitutional. *Cincinnati, W. & Z. R. Co. v. County of Clinton Comrs.*, 1 Ohio St. 77. The unbroken current of authority supports this proposition. \* \* \*

Exceptions sustained. \* \* \*

#### NOTE

1. An indictment for extortion (exaction of illegal fees) charged that Kirby was a license commissioner and by color of his office extorted. The court said that such an indictment would be good against a *de facto* officer but that since the statute purporting to create the office was unconstitutional, the "inexorable legal conclusion" was that the indictment was fatally defective because it charged defendant with using for extortionate purposes an office that did not exist. *Kirby v. State*, 57 N. J. L. 320, 31 Atl. 213 (1894).

## LANG v. MAYOR OF BAYONNE.

Court of Errors and Appeals of New Jersey, 1907.  
74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93,  
122 Am. St. 391, 12 Ann. Cas. 961.

[Plaintiff had been appointed a policeman under authority given the city by legislation prior to the act of 1905. A supplement to the act of 1905 purported to create a board of police commissioners with power to appoint and discharge for cause all members of the police force. After trial on charges before the commission it discharged the plaintiff from the force. The plaintiff petitioned the Supreme Court for a writ of mandamus to compel the mayor and chief of police to restore him on the ground that the act of 1905 was invalid. The Supreme Court denied the petition, whereupon he obtained this writ of error.]

GUMMERE, CHIEF JUSTICE. \* \* \* At the term at which the hearing of this cause was had before the Supreme Court, that tribunal had before it for consideration and determination the case of *State v. Nealon*, 44 Vroom 100, which was a quo warranto proceeding attacking the right of the members of the board of police commissioners of Bayonne to hold their respective offices, on the ground that the supplement of 1905, above referred to, was unconstitutional, and the conclusion reached by the Supreme Court in that case was in favor of this contention.

Notwithstanding the conclusion reached by it in the *Nealon* case, however, the court considered that \* \* \* the board of police commissioners, at the time when it dismissed the relator from his position as a member of the police force, was a de facto body, exercising a public function under color of right, and that therefore its action in dismissing the relator could not be successfully challenged, \* \* \*.

Plaintiff in error rests his right to a reversal of the judgment against him upon the ground that the conclusion of the Supreme Court that the board of police commissioners of Bayonne, appointed under authority of the supplement of 1905, was a de facto body, notwithstanding the fact that the statute is unconstitutional, is unsound in law, and \* \* \* cites the decision of the Supreme Court in the case of *Flaucher v. Camden*, 27 Vroom 244, as an authority in support of his contention that this question must be answered in the negative. An examination of the opinion in the *Flaucher* case discloses not only that the legal question there presented for consideration is identical with that which this case presents, but that the conclusion then reached by the Supreme Court is in direct opposition to that announced in the opinion delivered by it in this case. In the earlier case the plaintiff in error was tried in the police court of the city of Camden for selling liquor without a license. His defence

was that he held a license from the county board of license commissioners. Notwithstanding this fact he was convicted. On writ of error this conviction was affirmed by the Supreme Court. The ground of affirmance was that the statute creating the county board of license commissioners was unconstitutional, as had already been determined by it at the same term in a quo warranto proceeding brought against the members of the board (*Loucks v. Bradshaw*, Id. 1); that being unconstitutional, the so-called county board of license commissioners never had legal existence, and that consequently the members of the board were neither *de jure* nor *de facto* officers; the court declaring that "where the office itself is created by an unconstitutional statute there can be no incumbent either *de jure* or *de facto*," and that consequently the license was mere waste paper. The opinion in the *Flaucher* case is a carefully considered one, and is fully supported by the authorities cited in it \* \* \*, notably by that of *Norton v. Shelby County*, 118 U. S. 425. \* \* \* Notwithstanding that *Norton v. Shelby County* has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void *ab initio* and affords no protection for acts done under its sanction. That it works injustice in its application to the citizen is apparent. The *Flaucher* case is a pregnant example of the truth of this assertion. The legislature had enacted a general law, making the unlicensed sales of intoxicating liquor a criminal offence, but legalizing such sales when made by a person holding a license from the proper authority. It then, by a subsequent statute, created the county board of license commissioners the proper authority to grant such licenses in the county of Camden. *Flaucher* applied to, and received from, this board a license to sell liquors at his saloon in the City of Camden. At that time the law creating the county board stood upon the statute book, apparently as valid, as much entitled to be respected and obeyed as the enactment which prohibited the sale of liquor without a license. And yet, notwithstanding that he scrupulously observed the law, as declared by the legislature, he was made a criminal by judicial decision, a decision which in its operation and effect was as much *ex post facto* as any statute which makes criminal an antecedent act which violated no law at the time when it was done.

The vice of the doctrine of *Norton v. Shelby County*, as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law. Each of these functions has been delegated by the constitution, the one to the judicial and the other to the legislative branch of the government. And it is to be observed that the judicial function of determining the validity of statutes is confined within a very narrow scope. Courts are not vested with the

general supervision of legislation. They have received no authority from the people to inspect each statute, as it comes from the hands of the legislature, and declare whether or not it infringes constitutional limitations. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised in rem, but always in personam. *Allison v. Corker*, 38 Vroom 596. Only such statutes as affect the rights of parties to judicial proceedings are ever subjected to the scrutiny of the courts. And these are comparatively few. Of the twenty-four hundred and more acts of the legislature passed in this state during the last ten years, less than four hundred have received judicial consideration. The remaining two thousand which are upon the statute book (except those which have been repealed by the legislature) are accepted and enforced as a part of the law of the land. And this, in my judgment, is the only way in which a government such as ours can be safely administered. To require the citizen to determine for himself, at his peril, to what extent, if at all, the legislature has overstepped the boundaries defined by the constitution in passing this mass of statutes would be to place upon him an intolerable burden, one which it would be absolutely impossible for him to bear—a duty infinitely beyond his ability to perform. In my opinion the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him so long as it remains unreversed. \* \* \* So necessary to the successful carrying on of a republican form of government is the principle \* \* \*, that a statute which creates an office and provides an officer to perform its duties must have the force of law until condemned as unconstitutional by the courts, and that in the meantime the officer so provided is an officer de facto, that it is impliedly recognized and acted on, almost universally (so far as my examination has disclosed), in the case of municipal corporations which have been created by unconstitutional laws. Such corporations are declared to be de facto corporations. *Dill. Mun. Corp.*, § 43a; *Burt v. Winona, &c., Railroad Co.*, 31 Minn. 472, and cases cited. And not only so, but courts refuse to permit the legality of their existence to be called into question, except by the state itself, through its attorney-general, and hold that, so long as the state does not see fit to interfere and terminate the existence thereof by direct proceeding brought by the attorney-general, a municipal corporation which has been created by an unconstitutional statute may exercise upon the citizen, through its officers, the powers conferred upon it by the statute as fully and completely as if it was created by a law valid in every particular.

And yet, if it be true that there cannot be such a thing as a de facto officer unless there be a de jure office, on what theory can the acts of such officers be recognized as valid? How can it be true that a law of this character, the validity of which no one but the attorney-

general can challenge, and which is permitted to be enforced to the fullest extent against the public, "confers no rights, imposes no duties, affords no protection, creates no office," and "is, in legal contemplation, as inoperative as if it had never been passed?" \* \* \*

I conclude that an officer appointed under authority of a statute to fill an office created by the statute is at least a de facto officer, and that acts done by him antecedent to a judicial declaration that the statute is unconstitutional are valid, so far as they involve the interests of the public and of third persons; and the doctrine promulgated by the Supreme Court in *Flaucher v. Camden* rests upon an unsound basis and should not be followed.

The judgment under review must be affirmed for the reason stated in the opinion delivered in the court below, namely, that the board of police commissioners of Bayonne, at the time of its dismissal of the plaintiff in error from the municipal police force, was a de facto body and its action, therefore, valid as against him.

#### NOTES

1. Plaintiff secured judgment against defendant in a municipal court. Thereafter the statute creating the municipal court, which had been in operation for six years, was declared unconstitutional. Plaintiff's writ of execution was returned unsatisfied and he secured an order in supplementary proceedings. Defendant appeared specially and moved to terminate the proceedings and strike the judgment on the ground that all the proceedings were void because the court was created under an unconstitutional statute. An order granting defendant's motion was reversed on appeal. The court held that where a court has gone into operation under an apparently valid legislative act, it is to be regarded as a court de facto, and any order or judgment entered antecedent to a determination that the statute creating the court is unconstitutional is valid and binding. *Marckel Co. v. Zitzow*, 218 Minn. 305, 15 N. W. (2d) 777 (1944), noted in 29 Minn. L. Rev. 36 (1944).

2. Many cases on both sides of the conflict between *Norton v. Shelby County* and *Lang v. Mayor of Bayonne* are digested in Note, 15 L. R. A. (N. S.) 94 (1908). The note discloses such a tendency to distinguish and qualify that it is doubtful if a preponderance of authority can be said to appear. Moreover, the note does not distinguish the character of the legal relations that were defeated or sustained by the adoption or rejection of the formula of *Norton v. Shelby County*. Compare, for example, the issues involved in the following cases: *Ex parte Snyder*, 64 Mo. 58 (1876) (the invalid statute purported to create a court and a person convicted by that court was discharged on habeas corpus by the Supreme Court, which recited the formula, no de facto officer where there is no de jure office); *State v. Pooler*, 105 Me. 224, 71 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. 543 (1909) (a conviction was sustained over an exception to the indictment that a special prosecuting attorney represented the state in the grand jury room and swore in the witnesses, although the court concluded that the statute which purported to create the office of special prosecutor was unconstitutional); *King Lumber Co. v. Crow*, 155 Ala. 504, 46 So. 646, 130 Am. St. 65 (1908) (where separate acknowledgment by a wife of assent to a mortgage on the homestead was necessary to bind her interest and a wife acknowledged before the "judge of the inferior court of Woodlawn," it was held in a bill to quiet title brought by a successor of the mortgagee that the acknowledgment was

void because the statute which purported to create the court had not passed the legislature in the manner required by the state constitution,—that the de facto officer doctrine could not apply). For discussion of various aspects of the law of de facto officers see Constantineau, Public Officers and the De Facto Doctrine (1910). See also, Tooke, De Facto Municipal Corporations Under Unconstitutional Statutes, 37 Yale L. J. 935 (1928).

CHICOT COUNTY DRAINAGE DISTRICT v.  
BAXTER STATE BANK.

Supreme Court of the United States, 1940.  
308 U. S. 371, 84 L. ed. 329, 60 Sup. Ct. 317.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondents brought this suit in the United States District Court for the Western Division of the Eastern District of Arkansas to recover on fourteen bonds of \$1,000 each, which had been issued in 1924 by the petitioner, Chicot County Drainage District organized under statutes of Arkansas, and had been in default since 1932.

In its answer, petitioner pleaded a decree of the same District Court in a proceeding instituted by petitioner to effect a plan of readjustment of its indebtedness under the Act of May 24, 1934, providing for "Municipal-Debt Readjustment." \* \* \* The decree provided for the application of the amount paid into court to the remaining old obligations of petitioner, that such obligations might be presented within one year, and that unless so presented they should be forever barred from participating in the plan of readjustment or in the fund paid into court. Except for the provision for such presentation, the decree canceled the old bonds and the holders were enjoined from thereafter asserting any claim thereon.

Petitioner pleaded this decree, which was entered in March, 1936, as res judicata. Respondents demurred to the answer. Thereupon the parties stipulated for trial without a jury.

The evidence showed respondents' ownership of the bonds in suit and that respondents had notice of the proceeding for debt readjustment. The record of that proceeding, including the final decree, was introduced. The District Court ruled in favor of respondents and the Circuit Court of Appeals affirmed. 103 F. (2d) 847. The decision was placed upon the ground that the decree was void because, subsequent to its entry, this Court in a proceeding relating to a municipal district in Texas had declared the statute under which the District Court had acted to be unconstitutional. *Ashton v. Cameron County District*, 298 U. S. 513. \* \* \*

The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v.*

Shelby County, 118 U. S. 425, 442; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of *res judicata* as it now comes before us.

First. Apart from the contention as to the effect of the later decision as to constitutionality, all the elements necessary to constitute the defense of *res judicata* are present. It appears that the proceedings in the District Court to bring about a plan of readjustment were conducted in complete conformity to the statute. The Circuit Court of Appeals observed that no question had been raised as to the regularity of the court's action. The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceeding and were parties, and the evidence was to the same effect, showing compliance with the statute in that respect. As parties, these bondholders had full opportunity to present any objections to the proceeding, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it. \* \* \*

Second. The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the

District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.

In the early case of *M'Cormick v. Sullivan*, 10 Wheat. 192, where it was contended that the decree of the federal district court did not show that the parties to the proceedings were citizens of different States and hence that the suit was *coram non iudice* and the decree void, this Court said: "But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior Courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities." \* \* \* This rule applies equally to the decrees of the District Court sitting in bankruptcy, that is, purporting to act under a statute of Congress passed in the exercise of the bankruptcy power. The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action. *Stoll v. Gottlieb*, 305 U. S. 165, 171, 172.

Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. In the present instance it is suggested that the situation of petitioner, Chicot County Drainage District, is different from that of the municipal district before the court in the *Ashton Case*, 298 U. S. 513. Petitioner contends that it is not a political subdivision of the State of Arkansas but an agent of the property owners within the district. See *Drainage Dist. v. Hutchins*, 184 Ark. 521, 42 S. W. (2d) 996. We do not refer to that phase of the case as now determinative but merely as illustrating the sort of question which the District Court might have been called upon to resolve had the validity of the Act of Congress in the present application been raised. As the question of validity was one which had to be determined by a judicial decision, if determined

at all, no reason appears why it should not be regarded as determinable by the District Court like any other question affecting its jurisdiction. There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. *Stoll v. Gottlieb*, 305 U. S. 165, *supra*.

The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, "but also as respects any other available matter which might have been presented to that end." *Grubb v. Public Utilities Commission*, 281 U. S. 470, *supra*; *Cromwell v. Sac County*, 94 U. S. 351, *supra*.

The judgment is reversed and the cause is remanded to the District Court with direction to dismiss the complaint.

Reversed.

#### NOTES

1. The principal case was concerned with the *res judicata* character of a municipal debt readjustment proceeding under a federal statute subsequently held invalid. Consider the problem which arises in a criminal prosecution where the statute which the defendant was convicted of violating is subsequently held unconstitutional by a state court of last resort. Assuming that the time for direct appeal has lapsed, should the defendant be permitted to attack the judgment against him collaterally through habeas corpus, proceeding upon the theory that the judgment is void for want of jurisdiction of the convicting court? In such a situation the courts of some states afford no relief. Petition for executive clemency is the defendant's only recourse. In other states, however, the judgment may be attacked collaterally by habeas corpus and the prisoner discharged. Courts that refuse relief point out that traditionally habeas corpus, when used to attack a judicial conviction, is limited to instances where the convicting court acted without jurisdiction, which is not true where the only error made is as to the substantive law of the case. The court had jurisdiction to try the defendant on the charge made. Its error in holding the statute valid was an error made in the course of exercising its jurisdiction. Courts that allow such judgments to be attacked by habeas corpus have pursued a somewhat tortuous course of reasoning in arriving at a desirable result. Many cases—state and federal—are discussed in Note, 39 L. R. A. 449 (1898).

2. Contrast with the principal case decisions in criminal cases holding that where the statute upon which the jurisdiction of the convicting court depends is held unconstitutional, prisoners previously convicted may by habeas corpus attack the judgments against them as "void" for want of jurisdiction. *Ex parte Settle*, 114 Va. 715, 77 S. E. 496 (1913), and see *State ex rel. Larkin v. Ryan*, 70 Wis. 676, 36 N. W. 823 (1888). *Contra*: *In re Parrish*, 214 Mich. 24, 182 N. W. 46 (1921).

3. On the general subject of the effect of unconstitutionality see the following: Field, *The Effect of an Unconstitutional Statute* (1935); Note, *The Effect of Declaring a Statute Unconstitutional*, 29 Col. L. Rev. 1140 (1929), 1 *Selected Essays on Constitutional Law* (1938), 722; Note, *The Permanence of Constitutionality*, 40 Yale L. J. 1101 (1931), 1 *Selected Essays on Constitutional Law* (1938), 730; Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 Minn. L. Rev. 585 (1927).

### SHEPHERD v. WHEELING.

Supreme Court of West Virginia, 1887.  
30 W. Va. 479, 4 S. E. 635.

[A West Virginia statute purported to authorize the state circuit court upon petition of "ten tax-payers" of a city to "supersede, revoke and annul" "any ordinance" "made contrary to law." Ten tax-payers of the city of Wheeling petitioned the circuit court to exercise this power against an ordinance of that city which purported to create a board of police and fire commissioners. The court directed the city and the commissioners to be summoned as defendants. They appeared and moved for a dismissal asserting that the state statute was invalid. Overruling this motion the circuit court gave judgment annulling the ordinance in part. The defendants obtained a writ of error.]

SNYDER, J. \* \* \* The enactment of an ordinance by a city council, or the enactment of a statute by a legislature, being in each case the exercise of legislative power, the repeal of such ordinance or statute must likewise be the exercise of legislative power. It does not require any precise definition of judicial power, or any nice discrimination as to its extent and limitations to determine that the act of repealing a statute is not the exercise of judicial power. \* \* \*

When, in the course of determining the rights of the parties to a particular suit or controversy, the court finds it necessary to ascertain whether or not a statute is unconstitutional, the court must necessarily pass upon that question; but in doing so it does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute-book; it does not repeal, "supersede, revoke, or annul" the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based upon the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a

court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it. \* \* \*

In a very able opinion by Shaw, C. J., \* \* \* that eminent judge says: " \* \* \* Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative powers; and to this extent only, therefore, are courts of justice called on to interpose." *Wellington v. Petitioners, etc.*, 16 Pick. 96. \* \* \*

The claim of the defendants in error requires them to maintain that the ordinance must be held naught by the court for all purposes, and not merely for the purposes of this proceeding; for unless such is the case, no one will be bound by the judgment, except, perhaps, the petitioners,—certainly, no other resident of the city would be bound. \* \* \* The petitioners do not allege any personal grievance or special injury to themselves or their rights. \* \* \*

The Circuit Court of Ohio county therefore erred in overruling the motion to dismiss the petition of J. B. Shepherd and others, and for that reason the judgment of said court must be reversed, and said petition dismissed, with costs.

#### NOTES

1. Iowa enacted a statute containing a provision prohibiting shipment of intoxicating liquor into the state. This provision was held unconstitutional in *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. 604 (1898), on the ground that such liquor was a legitimate article of interstate commerce and that under the commerce clause Congress alone could "outlaw" it. Subsequently Congress enacted a statute (the Webb-Kenyon Act) "outlawing" such liquor in interstate commerce, that is, in effect, making it subject to state prohibition of shipment into "dry" states. In *Stajcar v. Dickinson*, 185 Iowa 49, 169 N. W. 756 (1918), the Iowa court said of the above provision of the Iowa statute, "although nonenforceable, it remained a part of the statute, and by the enactment of the so-called Webb-Kenyon Act became operative and enforceable the same as though it had not previously been declared unconstitutional or had been enacted by the legislature subsequent to the passage of the law of Congress \* \* \*."

2. A statute may be invalid as applied to one state of facts and valid as applied to another. The particular factor that makes its application invalid in one case may or may not be present in other cases arising under the statute. Where a court decides merely that a statute cannot constitutionally be applied

to a case then before the court, the statute's general constitutional status remains unaffected by the decision. The reverse is true, however, where the invalidating factor is necessarily present in every case arising under the terms of the statute, as, for example, where the court holds that the statute is invalid because of a complete lack of power in the legislative body to enact it.

Where it appears from a decision of a court of last resort declaring a statute unconstitutional that the invalidating factor is bound to be present in every case arising within the purview of the statute, the decision is treated as having decided the issue of constitutionality for all other cases to which the statute, by its terms, applies. As a general rule, officials charged with the duty of administering such a statute make no further efforts to enforce it. In a situation of this type, therefore, it is unrealistic to say, as the court does in the principal case, that a decision holding a statute invalid "affects the parties only" and that the case "can be relied on only as a precedent." In some instances, indeed, a decision invalidating a law has even more serious consequences. For example, when the Supreme Court of the United States held the District of Columbia minimum wage statute unconstitutional in *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. 394, 24 A. L. R. 1238 (1923), all states having similar statutes were affected by the decision. Fourteen years later, the Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 Sup. Ct. 578, 108 A. L. R. 1330 (1937), overruling the *Adkins* case, apprised the states that such laws were no longer invalid under the federal Constitution. Many similar instances could be cited. For further discussion of the topic, see *Rottschaefer, Constitutional Law* (1939), 32-37.

### WELLER v. NEW YORK.

Supreme Court of the United States, 1925.  
268 U. S. 319, 69 L. ed. 978, 45 Sup. Ct. 556.

ERROR to a judgment of the Court of Special Sessions of the City of New York adjudging the plaintiff in error guilty of reselling theater tickets without a license, entered after successive affirmances by the Supreme Court, Appellate Division, and the Court of Appeals.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Chapter 590, New York Laws 1922, added eight sections, 167-174, to the General Business Law of the State. \* \* \* Section 168 directs: "No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller." And § 173 declares every violation of the inhibition shall be a misdemeanor.

By an information of the Court of Special Sessions, New York City, the District Attorney accused plaintiff in error of engaging in the business of reselling theatre tickets without the license required by law. The evidence showed he was engaged in that business, and it was conceded he had never taken out a license or complied with Chapter 590. His defense rested upon the claim that the statute is

repugnant to the Fourteenth Amendment. The trial court adjudged him guilty and imposed a fine of twenty-five dollars. This was affirmed by the Appellate Division and by the Court of Appeals. 207 App. Div. 337; 237 N. Y. 316. In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to resale prices were invalid.

Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish resale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the State to require such licenses is clear and that we need not determine the validity of the price restrictions.

It is not and, we think, it cannot seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets. The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the state we shall hold this provision severable and valid. *Brazee v. Michigan*, 241 U. S. 340. The statute itself declares (§ 174): "In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article." If § 172, which restricts resale prices were eliminated, a workable plan would still remain. See *Dorchy v. Kansas*, 264 U. S. 286.

The judgment of the court below is

Affirmed.

#### NOTES

1. On the doctrine applicable where a statute contains no saving or separability provision such as section 174 of the statute involved in the reported case, note the language of Mr. Chief Justice Fuller in *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601, 635-636, 39 L. ed. 1108, 15 Sup. Ct. 912 (1895): "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive which relate to the subject which has been under discussion; and as to them we think the rule \* \* \* is applicable, that if the different parts are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in *Poindexter v. Greenhow*, 114 U. S. 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see

and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact."

In *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48, 60, 129 N. E. 202, 207 (1920), Judge Cardozo said: "Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment \* \* \*. The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity has been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."

2. The question of separability with respect to a state statute is one which rests ultimately upon the courts of the state whose statute is involved. In *Dorchy v. Kansas*, 264 U. S. 286, 290-291, 68 L. ed. 686, 44 Sup. Ct. 323 (1924), Mr. Justice Brandeis said: "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this court \* \* \*. In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this court \* \* \*. In cases coming from the state courts, this court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court \* \* \*."

3. The effect of a separability clause in a statute was considered in *Williams v. Standard Oil Co.*, 278 U. S. 235, 73 L. ed. 287, 49 Sup. Ct. 115, 60 A. L. R. 596 (1929), where the court said that in the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. "The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." The fundamental question, then, is one of interpretation and of legislative intent. The separability declaration, while providing "a rule of construction which may sometimes aid in determining that intent," is not to be deemed "an inexorable demand." Many cases are collected in the Annotation in 73 L. ed. 287 (1929). See also, *Stern, Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 (1937); *Note*, 40 Harv. L. Rev. 626 (1927); *Note*, 25 Mich. L. Rev. 523 (1927).

## CHAPTER II

### INDEPENDENCE AND INTERRELATION OF DEPARTMENTS

#### Section 1.—The Judicial Power.

##### EX PARTE BAKELITE CORPORATION.

Supreme Court of the United States, 1929.  
279 U. S. 438, 73 L. ed. 789, 49 Sup. Ct. 411.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a petition for a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from findings of the Tariff Commission in a proceeding begun and conducted under § 316 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943, U. S. C. title 19, §§ 174-179. A rule to show cause was issued; return was made to the rule; and a hearing has been had on the petition and return.

\* \* \*

The grounds on which the jurisdiction of the Court of Customs Appeals was challenged in that court, and on which a writ of prohibition is sought here, are:

1. That the Court of Customs Appeals is an inferior court created by Congress under § 1 of Article 3 of the Constitution, and as such it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of § 2 of the same article.

2. That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section, but is merely an advisory proceeding in aid of executive action.

The Court of Customs Appeals considered these grounds in the order just stated and by its ruling sustained the first and rejected the second. 16 Ct. Cust. Appls. 378, 53 Treasury Decisions, 716.

In this Court counsel have addressed arguments not only to the two questions bearing on the jurisdiction of the Court of Customs Appeals, but also to the question whether, if that court be exceeding its jurisdiction, this Court has power to issue to it a writ of prohibition to arrest the unauthorized proceedings.

The power of this Court to issue writs of prohibition never has been clearly defined by statute or by decisions. And the existence of the power in a situation like the present is not free from doubt. But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case it is admissible, and is common practice, to pass the

question of power and to deny the writ because without warrant in other respects.

While Article 3 of the Constitution declares, in § 1, that the judicial power of the United States shall be vested in one Supreme Court and in "such inferior courts as the Congress may from time to time ordain and establish," and prescribes, in § 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in § 2 of Article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of § 2 of Article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

The first pronouncement on the subject by this Court was in *American Ins. Co. v. Canter*, 1 Pet. 511, where the status and jurisdiction of courts created by Congress for the territory of Florida were drawn in question. Chief Justice Marshall, speaking for the Court, said, p. 546:

"These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."

The ruling has been accepted and applied from that time to the present in cases relating to territorial courts. \* \* \*

Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may

reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies. \* \* \*

Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the board of general appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. But its functions, although mostly quasi judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination

has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court.

Some features of the act creating it are referred to in the opinion below as requiring a different conclusion; but when rightly understood they cannot be so regarded.

A feature much stressed is the absence of any provision respecting the tenure of the judges. From this it is argued that Congress intended the court to be a constitutional one, the judges of which would hold their offices during good behavior. And in support of the argument it is said that in creating courts Congress has made it a practice to distinguish between those intended to be constitutional and those intended to be legislative by making no provision respecting the tenure of judges of the former and expressly fixing the tenure of judges of the latter. But the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges and declared that they should hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts for some of the territories Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included.

Another feature much stressed is a provision purporting to authorize temporary assignments of circuit and district judges to the Court of Customs Appeals when vacancies occur in its membership or when any of its members are disqualified or otherwise unable to act. This, it is said, shows that Congress intended the court to be a constitutional one, for otherwise such assignments would be inadmissible under the Constitution. But if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is for that reason invalid and cannot be saved on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another. Besides, the inference sought to be drawn from that provision is effectually refuted by two later enactments—one permitting judges of that court to be assigned from time to time to the superior courts of the District of Columbia, which are legislative courts, and the other transferring to that court the advisory jurisdiction in respect of appeals

from the Patent Office which formerly was vested in the Court of Appeals of the District of Columbia.

Another feature to which attention was given is the denomination of the court as a United States court. That the court is a court of the United States is plain; but this is quite consistent with its being a legislative court.

As it is plain that the Court of Customs Appeals is a legislative and not a constitutional court, there is no need for now inquiring whether the proceeding under § 316 of the Tariff Act of 1922, now pending before it, is a case or controversy within the meaning of § 2 of Article 3 of the Constitution, for this section applies only to constitutional courts. Even if the proceeding is not such a case or controversy, the Court of Customs Appeals, being a legislative court, may be invested with jurisdiction of it, as is done by § 316.

Of course, a writ of prohibition does not lie to a court which is proceeding within the limits of its jurisdiction, as the Court of Customs Appeals appears to be doing in this instance.

Prohibition denied.

#### NOTES

1. *Note on the Separation of Powers.* Aristotle's Politics (Book IV) contains what is generally considered to be the original statement of the doctrine of separation of powers. "All constitutions," he wrote, "have three elements, concerning which the good lawgiver has to regard what is expedient for each constitution." Aristotle classified those who participate in government as (1) the element which deliberates about public affairs; (2) those concerned with the magistracies; and (3) those exercising judicial power. This classification corresponds roughly with the division of our federal and state governments into legislative, executive and judicial departments. Aristotle's account was descriptive; he did not enlarge upon the merits of these tripartite arrangements.

The English philosopher, John Locke, influenced profoundly by his acquaintance with, and participation in, the struggles of the House of Commons with the Stuart kings, supplied a more elaborate analysis of the doctrine, distinguishing between function and organ and justifying a division of functions in order to promote efficiency and guard against despotism. In chapter twelve of his *Essay Concerning the True Original Extent and End of Civil Government*, published in 1690, Locke wrote, in part: "And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government: therefore in well-ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons, who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care, that they make them for the public good. But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made,

and remain in force. And thus the *legislative* and *executive* power come often to be separated."

Montesquieu's classic treatise, *Spirit of the Laws*, was translated from the French in 1750. Its celebrated chapter on the English Constitution (Book XI, ch. 6) dealt with the separation of powers. Building upon Locke's thesis, Montesquieu stressed the importance of an independent judiciary, thus recapturing the original Aristotelian classification. He wrote: "When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. Miserable indeed would be the case, were the same man, or the same body whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals."

Montesquieu's work affected Blackstone's subsequent exposition of the English Constitution in his *Commentaries* and profoundly influenced the trend of political thought in the American colonies. Not only were the framers of the Constitution of the United States familiar with the views of both writers but they had profited from much practical experience under colonial and early state governments. Montesquieu's teachings on the separation of powers, however, were interpreted by some with a rigor and dogmatism which that philosopher doubtless never intended, and it became necessary for one of the founding fathers, James Madison, to defend the proposed Constitution from attack on the ground that its provisions offended the cherished concept in many particulars.

In Number 47 of *The Federalist* Madison argued forcibly that Montesquieu's warning was directed toward the *accumulation* or *monopoly* of powers in one department of government; he had never meant that the departments must be completely disconnected with, or exercise no control over, the acts of each other. In other words, the classic doctrine was to be flexibly, not rigidly, applied. The most effective way to safeguard the doctrine was to give each department the strength necessary to resist the encroachments of the others. Montesquieu's model, the British Constitution, as well as the several state constitutions, were examined and many instances in which the principle of the separation of powers had been departed from were enumerated. "His [Montesquieu's] meaning," wrote Madison, "as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."

The theory of separation of powers is formally announced in forty state constitutions. While such a formal declaration is not found in eight state constitutions nor in the Constitution of the United States, the same constitutional result arises from the fact that these several documents create three departments of government, vesting the legislative power in one, the executive power in another, and the judicial power in a third.

For discussions of the principle of separation of powers and the doctrine of checks and balances, see the following: Green, *Separation of Governmental Powers*, 29 Yale L. J. 369 (1920), 4 *Selected Essays on Constitutional Law* (1938), 195; Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. of Chi. L. Rev. 385 (1935), 4 *Selected Essays on Constitutional Law* (1938), 168; Fairlie, *The Separation of Powers*, 21 Mich. L. Rev. 393 (1923); Dodd, *State Government* (2d ed. 1928), ch. III.

2. In *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, 53 Sup. Ct. 740 (1933) the Supreme Court held that the Supreme Court and the Court of Appeals of the District of Columbia (now termed, respectively, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit) are "constitutional" courts of the United States, established under Article III of the Constitution, that the judges of these courts hold their offices during good behavior, and that their compensation cannot be diminished during their continuance in office. The court said: "In respect of them we take the true rule to be that they are courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in section 2 of Article III. The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, *ipso facto*, vested in such courts as inferior courts of the United States." With reference to its statement in the opinion in *Ex parte Bakelite Corporation* that the courts of the District of Columbia are "legislative courts" the court said: "This observation, made incidentally, by way of illustration merely and without discussion or elaboration, was not necessary to the decision, and is not in harmony with the views expressed in the present opinion." The court pointed out, however, that in creating and defining the jurisdiction of the District of Columbia courts, Congress is not limited to Article III of the Constitution (as it is in dealing with other federal courts), but by virtue of the plenary legislative power which Congress exercises over the District (Art. I, § 8, cl. 17) may confer on its courts functions of a legislative, administrative or advisory character, citing its opinion in *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442, 67 L. ed. 731, 736, 43 Sup. Ct. 445 (1923).

3. In 1929 Congress extended the jurisdiction of the Court of Customs Appeals to patent cases and its name was changed to the United States Court of Customs and Patent Appeals. See 28 U. S. C. §§ 211-216, inc.

4. The United States Court of Claims has been held to have been established in the exercise of the power of Congress under the Constitution (Art. I, § 8, cl. 1) to provide for the investigation and settlement of those claims against the United States in respect of which it has waived its sovereign immunity from suit. Since this is not a part of the judicial power defined in Article III, the Court of Claims is a "legislative" court. *Williams v. United States*, 289 U. S. 553, 77 L. ed. 1372, 53 Sup. Ct. 751 (1933). Under the reasoning of this case the appellate jurisdiction of the Supreme Court is now properly extended by Congress to the "judicial" decisions of the Court of Claims but not to its "legislative" or "advisory" decisions. It would be a violation of the doctrine of the separation of powers for Congress to impose "nonjudicial" functions upon a "constitutional" court—unless, of course, empowered to do so by virtue of some specific provision of the Constitution, as in the case of the courts of the District of Columbia. But Congress may nevertheless vest in "constitutional" courts judicial powers that are no part of the judicial power defined by Article III. Thus the Supreme Court's appellate jurisdiction to review "judicial" judgments of the Court of Claims enables it to review cases that are not included in the judicial power as defined in Article III.

5. Cases in the Court of Claims are reviewable in the Supreme Court either on certiorari or on certification of a question of law by the Court of Claims itself. (28 U. S. C. § 1255; F. C. A. 28 § 1255.) Cases in the Court of Customs and Patent Appeals may be reviewed on certiorari only. (28 U. S. C. § 1256; F. C. A. 28 § 1256.) There is no appeal of right from either court.

6. For further discussion of the distinction between "constitutional" courts, created under the authority of Article III of the Constitution, and "legislative"

courts, established under authority given by other provisions of the Constitution, and for consideration of the effect of judicial immunity from administrative duties, see: Katz, *Federal Legislative Courts*, 43 *Harv. L. Rev.* 894 (1930), 4 *Selected Essays on Constitutional Law* (1938), 1211; Watson, *Concept of the Legislative Court: A Constitutional Fiction*, 10 *Geo. Wash. L. Rev.* 799 (1942); Note, *The Restrictive Effect of Article III on the Organization of Federal Courts*, 34 *Col. L. Rev.* 344 (1934), 4 *Selected Essays on Constitutional Law* (1938), 1237; Note, *The Judicial Power of Federal Tribunals Not Organized Under Article III*, 34 *Col. L. Rev.* 746 (1934), 4 *Selected Essays on Constitutional Law* (1938), 1249.

7. The power to promulgate rules of procedure was held to be judicial in *Wayman v. Southard*, 10 *Wheat.* 1, 6 *L. ed.* 253 (1825). So, too, is the power to entertain a proceeding which results in a judgment that a person is entitled to a certificate of naturalization. *Tutun v. United States*, 270 *U. S.* 568, 70 *L. ed.* 738, 46 *Sup. Ct.* 425 (1926).

### POPE v. UNITED STATES.

Supreme Court of the United States, 1944.  
323 *U. S.* 1, 89 *L. ed.* 3, 65 *Sup. Ct.* 16.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether Congress exceeded its constitutional authority in enacting the Special Act of February 27, 1942, 56 *Stat.* 1122, c. 122, by which, "notwithstanding any prior determination" or "any statute of limitations," it purported to confer jurisdiction on the Court of Claims to "hear and determine," and directed it to "render judgment" upon, certain claims of petitioner against the Government in conformity to directions given in the Act.

Petitioner brought the present proceeding in the Court of Claims to recover upon his claims as specified and sanctioned by the Special Act. The court dismissed the proceeding on the ground that the Act was unconstitutional. 100 *Ct. Cl.* (F) 375. It thought that in requiring the court to make a mathematical calculation of the amount of petitioner's claims upon the basis of data enumerated in the Act and to give judgment for the amount so ascertained, notwithstanding the rejection of those claims in an earlier suit in the Court of Claims, the Act was an unconstitutional encroachment by Congress upon the judicial function of the court. Holding that it was free to ignore the congressional command because given without constitutional authority, the court gave judgment dismissing the proceeding.

The case comes here on petition for certiorari which assigns as error the ruling below that the congressional mandate was without constitutional authority. Because of the importance of the questions involved we issued the writ, 321 *U. S.* 761. For reasons which will presently appear, we hold that we have jurisdiction to review the judgment below.

Several years before the enactment of the Special Act, petitioner brought suit in the Court of Claims to recover amounts alleged to be due upon his contract with the Government for the construction of a

tunnel as a part of the water system of the District of Columbia. The construction involved certain excavation and certain filling of the excavated space, in part with concrete and in part with dry packing and grout. Dry packing consists of closely packed broken rock, into which is pumped the grout, a thin liquid mixture of sand, cement and water, which, when it hardens, serves to solidify and strengthen the dry packing.

Included in the demands for which the suit was brought were certain claims which are now asserted in this proceeding. They comprise a claim for additional excavation and concrete work alleged to have been required because of certain orders of the contracting officer, and a claim for dry packing and grout furnished by petitioner and placed by him in certain excavated space outside the so-called "B" line shown on the contract drawings. The "B" line marked the outer limits of the tunnel beyond which, by the terms of the contract, petitioner was not to be paid for excavation.

In the first suit it appeared that petitioner sought recovery for excavation, for which he had not been paid, of the space at the top of the tunnel where the contracting officer had lowered the "B" line by three inches, thus decreasing the space for the excavation for which the contract authorized payment to be made. The Court of Claims denied recovery of this item. The contracting officer had also directed the omission of certain timber supports or lagging required by the contract to be placed on the side walls of certain sections of the tunnel. Cave-ins from the sides resulted, making it necessary that the caved-in material be removed and that the resulting space be filled with concrete, all at increased expense to petitioner. The Court of Claims made findings showing the amount of the additional excavation and concrete work claimed, but denied recovery on these items because the order of the contracting officer for the additional work involved a change in the contract which was not in writing as the contract required.

The Court of Claims also denied petitioner's claim for dry packing and grout. It was of opinion that the Government had received the benefit of and was liable for whatever dry packing petitioner had done and for so much of the grout as had actually found its way into the dry packed space and had remained there. But it denied recovery because of deficiency in the proof as to the extent of this space. The only proof offered was the "liquid method" of computation, based on the number of bags of cement used in the preparation of all the grout furnished by petitioner, the cement constituting a fixed proportion of the grout. The court held, with the Government, that the seepage of the grout into areas outside that dry packed rendered the liquid method an unreliable measure for determining either the volume of the dry packing or the amount of the grout required for it. The court gave judgment accordingly, while allowing to petitioner other claims upon his contract with which we are not here concerned. Petitioner's motions for a new trial

were denied by the Court of Claims, and this Court denied certiorari. 303 U. S. 654.

The Special Act of Congress directed the Court of Claims to "render judgment at contract rates upon the claims" of petitioner for "certain work performed for which he has not been paid, but of which the Government has received the use and benefit," and gave jurisdiction to this Court to review the judgment by certiorari. Section 2 of the Act defined the work to be compensated as "the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." The Act further directed that the court should consider as evidence in the case "any or all of the evidence" taken by either party in the earlier suit, "together with any additional evidence which may be taken."

The Court of Claims in construing the Special Act said (100 Ct. Cl. (F) p. 379):

"A rereading of § 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add the results and render judgment for the plaintiff for the sum. If this reading of § 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the questions of law which were in the case upon its former trial and would, but for the act, be in it now, and to decide all questions of fact except certain simple computations." So construed it thought the Special Act directed the Court of Claims to decide again the case or controversy which it had decided in the first suit, "to decide it for the plaintiff and give him a judgment for an amount" determined by a "simple computation, based upon data referred to in the Special Act." This it concluded Congress could not "effectively direct."

For this conclusion it relied upon *United States v. Klein*, 13 Wall. 128, in which this Court ruled that Congress was without constitutional

power to prescribe a rule of decision for a case pending on appeal in this Court so as to require it to order dismissal of the suit in which the Court of Claims had given judgment for the claimant. Decision was rested upon the ground that the judicial power over the pending appeal resided with this Court in the exercise of its appellate jurisdiction, and that Congress was without constitutional authority to control the exercise of its judicial power and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit.

As the opinion in the Klein case pointed out, pp. 144, 145, the Act of March 17, 1866, 14 Stat. 9, c. 19, conferred on the Court of Claims judicial power by giving it authority to render final judgments in those cases and controversies which, pursuant to existing statutes, had been previously litigated before it. By later statutes this authority was extended to future cases and the Court has since exercised the judicial power thus conferred upon it. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 454; *United States v. Jones*, 119 U. S. 477. We do not consider just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor of the Government and to require relitigation of the suit. For we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case.

Before the Special Act the claims of petitioner on his contract with the Government had been passed upon judicially and merged in a judgment which was final. *United States v. Jones*, *supra*; *Re Sanborn*, 148 U. S. 222, 225; *Luckenbach S. S. Co. v. United States*, 272 U. S. 533, 536 *et seq.* This Court denied *certiorari*, and the judgment, which remains undisturbed by any subsequent legislative or judicial action, conclusively established that petitioner was not entitled to recover on his claims. The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved against petitioner. While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before. And such being its effect, the Act's impact upon the performance by the Court of Claims of its judicial duties seems not to be any different than it would have been if petitioner's claims had not been previously adjudicated there.

We perceive no constitutional obstacle to Congress's imposing on the Government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts,

conferred by § 8 of Article 1 of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. *Roberts v. United States*, 92 U. S. 41; *United States v. Realty Co.*, 163 U. S. 427; *United States v. Cook*, 257 U. S. 523; *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 314. Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly. \* \* \*

Congress having exercised its constitutional authority to impose on the Government a legally binding obligation, the decisive question is whether it invaded the judicial province of the Court of Claims by directing it to determine the extent of the obligation by reference, as directed, to the specified facts, and to give judgment for that amount. In answering, it is important that the Act contemplated that petitioner should bring suit on his claims in the usual manner, that the court was given jurisdiction to decide it and that petitioner by bringing the suit has invoked, for its decision, whatever judicial power the court possesses. Cf. *United States v. Realty Co.*, 163 U. S. 427. In this posture of the case it is pertinent to inquire what, if anything, Congress added to or subtracted from the judicial duties of the Court of Claims by directing that it consider the case and give judgment for the amount found to be due. Stripped of all complexities of detail the case is one in which, simply stated, petitioner has sought to enforce the obligation, which the Government has assumed, to pay him for work done and not paid for. Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data.

When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable. Nor is it any the less so because the amount recoverable depends upon a mathematical computation based upon data to be ascertained which by the terms of the obligation are its measure. For in any case the court is called on to sanction, by its judgment, an alleged obligation in a proceeding in which the existence, validity and extent of the obligation, the existence of the data, and the correctness of the computation may be put in issue.

The court below seems to have assumed that its only function under the Special Act was to make a calculation based upon data to be found in the Act and in the findings of the earlier suit. In view of the provisions of the Special Act for taking evidence and for considering the

evidence in the first suit, we cannot say that all the earlier findings are to be deemed conclusive and that the court could not have been called on in this proceeding to determine judicially whether they are so. Whether the Act makes them conclusive, and if not, whether the evidence would establish the facts on which the Act predicates liability, are judicial questions. But if the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether there is a legally binding obligation and, if so, to give judgment for the amount due even though the amount depends upon mere computation.

\* \* \*

We conclude that the effect of the Special Act was to authorize petitioner to invoke the judicial power of the Court of Claims, and that he has done so. It is true that Congress has imposed on that court, as it has on the courts of the District of Columbia, nonjudicial duties of an administrative or legislative character. See *Re Sanborn*, 148 U. S. 222; *Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co.*, 289 U. S. 266, 275. Those imposed on the Court of Claims are such as it has traditionally exercised ever since its original organization as a mere agency of Congress to aid it in the performance of its constitutional duty to provide for payment of the debts of the Government. Such administrative duties coexist with its judicial functions. See *Ex parte Bakelite Corp.*, *supra*. Its decisions rendered in its administrative capacity are not judicial acts, and their review, even though sanctioned by Congress, is not within the appellate jurisdiction of this Court. *Gordon v. United States*, 2 Wall. 561; and see the views expressed by Taney, Ch. J., in 117 U. S. 697. But notwithstanding the retention of such administrative duties by the Court of Claims, as in the case of the courts of the District of Columbia, Congress has provided for appellate review of the judgments of both courts rendered in their judicial capacity. And this Court has held by an unbroken line of decisions, that its appellate jurisdiction, conferred by Art. 3, § 2, cl. 2 of the Constitution, extends to the review of such judgments of the Court of Claims; *De Groot v. United States*, 5 Wall. 419; *United States v. Jones*, 119 U. S. 477; *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 263; and of the courts of the District of Columbia; *Federal Radio Commission v. Nelson Bros. Bond and Mortg. Co.*, 289 U. S. 266, *supra*, and cases cited. \* \* \*

The Court of Claims' determination that the Special Act conferred upon it only nonjudicial functions and hence that it had no judicial duty to perform was itself an exercise of judicial power reviewable here. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. The case is not one where the court below has made merely an administrative decision not subject to judicial review, without purporting to act judicially or to rule as to the extent of its judicial authority as the ground of its action or refusal to act. *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693. Jurisdiction to decide is jurisdiction to make a

wrong as well as a right decision. *Fauntleroy v. Lum*, 210 U. S. 230, 234, 235; *Burnet v. Desmornes y Alvarez*, 226 U. S. 145, 147.

Reversed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

#### NOTES

1. The determination of whether an applicant for admission to the bar possesses the necessary learning and character qualifications is generally deemed to be a judicial function, inherent in the courts. While a state legislature may enact valid laws in aid of this judicial function and may, if in furtherance thereof, fix minimum requirements for admission, it may not fix maximum requirements. In *Application of Kaufman*, 69 Idaho 297, 206 Pac. (2d) 528 (1949) it was held, in accordance with these views, that a statute which provided that graduates of the law school of the University of Idaho of good moral character should be admitted to the bar without examination was an invasion of the judicial power and violative of provisions of the State Constitution establishing the separate branches of government and prohibiting the legislature from invading the judiciary. The case authorities are collected and discussed in the opinion, where it is also noted that some ten states have so-called diploma privilege statutes similar to the one invalidated. For a thorough discussion of judicial control over admission to the bar and disbarment proceedings, see *In re Cannon*, 206 Wis. 374, 240 N. W. 441 (1932), where it was held that the legislature could not reinstate a disbarred attorney.

2. In *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52 (1818), it was held that a legislative act granting a new trial in a judicial proceeding was an invalid encroachment on judicial power and a violation of the doctrine of separation of powers, the court saying that "the judiciary would in every respect cease to be a check on the legislative, if the legislature could at pleasure revise or alter any of the judgments of the judiciary." At an earlier period the granting of divorces was considered to be a legitimate legislative function. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723 (1888). Provisions of many state constitutions, however, as well as more recent judicial decisions, now recognize that the function is exclusively judicial.

#### MICHAELSON v. UNITED STATES. SANDEFUR v. CANOE CREEK COAL CO.

Supreme Court of the United States, 1924.  
266 U. S. 42, 69 L. ed. 162, 45 Sup. Ct. 18.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court:

These cases were argued together and will be disposed of in one opinion. The principal question presented in the *Michaelson* Case, and the sole question in the *Sandefur* Case, is whether the provision of the Clayton Act of October 15, 1914, c. 323, 38 Stat. at L. 738, 739, §§ 21, 22, Comp. Stat. §§ 1245a, 1245b, requiring a jury trial in certain specified kinds of contempt, is constitutional. \* \* \*

The petitioners in the *Michaelson* Case were striking employees of the Chicago, St. Paul, Minneapolis, & Omaha Railway Company, and, with others, were proceeded against by bill in equity for combining and

conspiring to interfere with interstate commerce by picketing and the use of force and violence, etc. After a hearing, a preliminary injunction was granted. Subsequently, proceedings in contempt were instituted in the district court, charging petitioners with sundry violations of the injunction; and a rule to show cause was issued. Upon the answer and return to the rule, petitioners applied for a jury trial under § 22 of the Clayton Act; but the district court denied the application and proceeded without a jury. At the conclusion of the hearing, the petitioners were adjudged guilty and sentenced to pay fines in various sums, and, in default of payment, to stand committed to jail until such fines were paid. Thereupon the case was taken to the Circuit Court of Appeals by writ of error; and by that court the judgments were affirmed. 291 Fed. 940.

First. Is the provision of the Clayton Act, granting a right of trial by jury, constitutional? The court below held in the negative, on the ground that the power of a court to vindicate or enforce its decree in equity is inherent; is derived from the Constitution as a part of its judicial power; and that Congress is without constitutional authority to deprive the parties in an equity court of the right of trial by the chancellor.

If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented; and it, therefore, becomes our duty, as this Court has frequently said, to construe it, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Panama R. Co. v. Johnson*, 264 U. S. 375.

Shortly stated, the statute provides that wilful disobedience of any lawful writ, process, order, rule, decree, or command of any District Court of the United States or any court of the District of Columbia by doing any act or thing forbidden, if such act or thing be of such character as to constitute also a criminal offense under any statute of the United States or law of any state in which the act is committed, shall be proceeded against as in the statute provided. In all such cases the "trial may be by the court, or, upon demand of the accused, by a jury," and "such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information." Upon conviction the accused is to be punished "by fine or imprisonment, or both," the fine to be "paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct."

The provision for trial by jury upon demand, as we shall presently show, is mandatory; and the question to be answered is whether it infringes any power of the courts vested by the Constitution and unalterable by congressional legislation. We first inquire whether the pro-

ceeding contemplated by the statute is for a civil or a criminal contempt. If it be the latter,—since the proceeding for criminal contempt, unlike that for civil contempt, is between the public and the defendant, is an independent proceeding at law, and no part of the original cause, *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 444-446, 451,—we are at once relieved of the doubt which might otherwise arise in respect of the authority of Congress to set aside the settled rule that a suit in equity is to be tried by the chancellor without a jury unless he chooses to call one as purely advisory. We think the statute, reasonably construed, relates exclusively to criminal contempts. The act or thing charged must be of such character as also to constitute a crime. Prosecution must be in conformity with the practice in criminal cases. Upon conviction the accused is to be punished by fine or imprisonment, or both. True, the fine may be paid to the United States or to the complainant, or divided among the parties injured by the act, as the court may direct; but that does not alter the essential nature of the proceeding contemplated by the statute. The discretion given the court in this respect is incidental and subordinate to the dominating purpose of the proceeding, which is punitive, to vindicate the authority of the court and punish the act of disobedience as a public wrong. \* \* \*

But it is contended that the statute materially interferes with the inherent power of the courts, and is therefore invalid. That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress (*Ex parte Robinson*, 19 Wall. 505, 510, 511; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, and is, in express terms, carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is, to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise. But the simple question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent pro-

ceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt, and the defendant may not be compelled to be a witness against himself. *Gompers v. Buck's Stove & Range Co.*, *supra*, p. 444. The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. "So truly are they crimes that it seems to be proved that, in the early law, they were punished only by the usual criminal procedure (3 Transactions of the Royal Historical Society, N. S., 1885, p. 147), and that, at least in England, it seems that they still may be, and preferably are, tried in that way." *Gompers v. United States*, 233 U. S. 604, 610, 611. This is also pointed out by counsel in the case of *O'Shea v. O'Shea*, L. R. 15 Prob. Div. 59, 61; and, in the course of one of the opinions in that case, it is said (p. 64): "The offense of the appellant [criminal contempt] is certainly a criminal offense. I do not say that it is an indictable offense, but, whether indictable or not, it is a criminal offense, and it is an offense, and the only offense that I know of, which is punishable at common law by summary process." The proceeding is not between the parties to the original suit, but between the public and the defendant. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information, is that in the latter the act complained of is the violation of a law, and, in the former, the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution, or violate that instrument in any other way. \* \* \*

We take no time to discuss the contention that the acts alleged as constituting contempt do not also constitute criminal offenses. According to the petition for the rule and affidavits in support of it, these consisted of abusive language, assembling in numbers, picketing, and other acts for the purpose of intimidating and preventing men desirous of securing employment with the railway company from entering such employment. *Prima facie*, at least, this violated the statute of Wisconsin, where the acts were committed (Rev. Stat., 1921, § 4466c), and this is enough. \* \* \*

The *Sandefur* Case is here on certificate requesting the instruction of this Court upon the following question of law:

"Do those provisions of § 22 of the Clayton Act which require a conviction upon a jury trial as a condition precedent to punishment for contempt, upon demand for a jury trial in the case specified, impose a valid restriction upon the inherent judicial power of the United States district courts?"

The facts stated in the certificate bring the case within the principle of what has already been said, and the question must be answered in the affirmative.

No. 246 reversed and remanded to the District Court for further proceedings in conformity with this opinion.

No. 232, answer: Yes.

#### NOTES

1. The Norris-La Guardia Act, enacted by Congress in 1932, withdrew from inferior federal courts the power to issue injunctions in a wide range of cases involving "labor disputes." It also gave the right of jury trial in virtually all contempt cases arising out of such disputes. Opponents of the measure argued that Congress could not constitutionally curtail the equity jurisdiction of the federal courts. The Supreme Court avoided passing upon the constitutionality of the statute during the earlier years of its operation, but the constitutionality of the limitation on the powers of the courts to issue injunctions was upheld by lower federal courts on the ground that it was a valid exercise by Congress of its power under the Constitution to define and limit the jurisdiction of the courts which it had created, and that the power to grant an injunction is not such an inherent attribute of jurisdiction over a subject as to render void a statute withholding such power. *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich. 1934); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d 1934), certiorari denied, 293 U. S. 595, 79 L. ed. 688, 55 Sup. Ct. 110 (1934); *United Electric Coal Companies v. Rice*, 80 F. (2d) 1 (C. C. A. 7th 1935), certiorari denied, 297 U. S. 714, 80 L. ed. 1000, 56 Sup. Ct. 590 (1936). The constitutionality of the statute was no longer open to question following the decisions of the Supreme Court in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229, 57 Sup. Ct. 857 (1937); *Lauf v. E. G. Shimmer & Co.*, 303 U. S. 323, 82 L. ed. 872, 58 Sup. Ct. 578 (1938); and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 82 L. ed. 1012, 58 Sup. Ct. 703 (1938).

2. Some state decisions have taken the view that the legislature may not validly provide for jury trial in indirect contempts. The earlier cases are discussed in 36 L. R. A. 254 (1897). See also *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310 (1899). In *Ex parte Creasy*, 243 Mo. 679, 148 S. W. 914, 41 L. R. A. (N. S.) 478 (1912) legislation fixing maximum punishments in cases of constructive contempts of court was upheld. On the power of Congress generally with respect to the "inferior courts" of the United States, see Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempt in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010 (1924), 4 *Selected Essays on Constitutional Law* (1938), 1422.

#### Section 2.—The Executive Department.

##### MISSISSIPPI v. JOHNSON.

Supreme Court of the United States, 1867.

4 Wall. 475, 18 L. ed. 437.

This was a motion made by Messrs. Sharkey and R. J. Walker, on behalf of the State of Mississippi, for leave to file a bill in the name of

the State praying this Court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and President of the United States, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two Acts of Congress named in the bill, one "An Act for the more Efficient Government of the Rebel States," passed March 2, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an Act supplementary to it, passed in the same way March 23, 1867; Acts commonly called the Reconstruction Acts. [Putting the then recently rebellious states under military government.]

MR. CHIEF JUSTICE CHASE delivered the opinion of the Court. \* \* \*

The Attorney General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this Court. \* \* \*

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. \* \* \*

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the Acts named in the bill. By the first of these Acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary Act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as Commander-in-Chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be

unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion. \* \* \*

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained. \* \* \*

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this Court to arrest proceedings in that court?

These questions answer themselves. \* \* \*

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an Act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an Act of Congress by the incumbent of the Presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

Denied.

#### NOTES

1. For the background of *Mississippi v. Johnson* see 3 Warren, *The Supreme Court in United States History* (1922), 177-182.

2. After the failure to get a decision on the validity of the Reconstruction Acts in *Mississippi v. Johnson*, another attempt was made when the State of Georgia filed a bill in the Supreme Court to enjoin Secretary of War Stanton and Generals Grant and Pope from carrying into effect these laws, alleging their unconstitutionality in that their aim was to overthrow the lawful state government and establish a different one. The Supreme Court, however, terming the issues involved "political" in character and applying the rule of *Mississippi v. Johnson*, granted the Attorney-General's motion to dismiss. *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721 (1867).

3. Where a discretion is conferred upon an administrative officer, courts will not interfere to control the manner of exercising it, unless fraud or abuse of power is shown. Many courts have also adopted the rule that mandamus will not issue to compel even the performance of a ministerial function by the head of an executive department of a state government. For an informative discussion of the immunity of a state governor from judicial compulsion, see Dodd, *Judicially Nonenforceable Provisions of Constitutions*, 80 U. of Pa. L. Rev. 54, 87-88 (1931), 1 *Selected Essays on Constitutional Law* (1938), 355, 389-391.

### RATHBUN v. UNITED STATES.

Supreme Court of the United States, 1935.  
295 U. S. 602, 79 L. ed. 1611, 55 Sup. Ct. 869.

[The Federal Trade Commission Act, c. 311, 38 Stat. 717, 718, §§ 1, 2, 15 U. S. C. §§ 41, 42, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate and Section 1 provides that not more than three of the commissioners shall be members of the same political party, that they shall be appointed for terms of seven years, and "any commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office."

William S. Humphrey had been appointed a commissioner by President Hoover and confirmed by the Senate. On July 25, 1933 and again on August 31, 1933, President Roosevelt asked him to resign, saying, "I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission. \* \* \* Humphrey declined to resign and on October 7, 1933, the President wrote him, "You are hereby removed from the office of Commissioner." Humphrey died February 14, 1934, and his executor sued in the Court of Claims for salary for the period between his "removal" and his death. That court certified two questions to the Supreme Court, (1) whether the statute, above quoted, was intended to limit the President's power of removal to the causes named in it; and (2) if so, was it constitutional.]

MR. JUSTICE SUTHERLAND delivered the opinion of the Court. \* \* \*  
Section 5 of the [Federal Trade Commission] Act (15 U. S. C. § 45) in part provides that:

"Unfair methods of competition in commerce are declared unlawful.

"The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order

to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate Circuit Court of Appeals for its enforcement. The party subject to the order may seek and obtain a review in the Circuit Court of Appeals in a manner provided by the act.

Section 6 (15 U. S. C. § 46), among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 (15 U. S. C. § 47), provides that: "In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. [The reasoning on this point is omitted here.] We conclude that the intent of the Act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*, 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative, and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's con-

tention, but these are beyond the point involved, and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.

\* \* \*

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers Case* cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers Case* finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no further; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition," that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Com-

mission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States*, 289 U. S. 553, 565-567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. \* \* \* The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have re-examined the precedents referred to in the *Myers Case*, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed from office by the President of the United States," certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers Case*, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers Case*, except to say

that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612. \* \* \*

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered:

Question No. 1, Yes. Question No. 2, Yes.

[MR. JUSTICE McREYNOLDS concurred in the result, referring to his separate opinion in *Myers v. United States*.]

#### NOTES

1. In *Myers v. United States*, 272 U. S. 52, 71 L. ed. 160, 47 Sup. Ct. 21 (1926), discussed in the principal case, a postmaster of the first class was removed by President Wilson prior to the expiration of his four-year term of office notwithstanding that the statute provided that postmasters of this class should be appointed and removed by the President by and with the advice and consent of the Senate and should hold their office for the full period unless sooner removed or suspended according to law. The Senate had not consented to the removal. The court held, through Mr. Chief Justice Taft, that the President had a power under the Constitution to remove executive officers appointed by him with the advice and consent of the Senate. The opinion relied upon the grant of executive power under Art. II, on the grant to the President of the power of appointment which was deemed to carry with it an implied power of removal, and on the "decision of 1789"—the historical recognition of the presidential power of removal in the first session of Congress following adoption of

the Constitution. Justices Holmes, McReynolds and Brandeis dissented. For discussions of the case see McBain, *Consequences of the President's Unlimited Power of Removal*, 41 Pol. Sci. Q. 596 (1926); Galloway, *The Consequences of the Myers Decision*, 61 Am. L. Rev. 481 (1927).

2. The docket title of the principal case was *Rathbun, Executor v. United States*. In the official reports it is entitled *Humphrey's Executor v. United States*.

3. In *Morgan v. Tennessee Valley Authority*, 115 F. (2d) 990 (1940), certiorari denied, 312 U. S. 701, 85 L. ed. 1135, 61 Sup. Ct. 806 (1941), the United States Circuit Court of Appeals for the Sixth Circuit held that the members of the Board of Directors of the Tennessee Valley Authority fall within the rule of the Myers case. The statute creating the T. V. A. provided that the directors should be appointed by the President by and with the advice and consent of the Senate and should hold office for nine years. It was contended that certain provisions of the statute restricted the President's power to remove the directors. It was held that to so construe these provisions would make them unconstitutional. The statutory functions of the directors were miscellaneous in character, but the court concluded that it was sufficient to bring the directors within the rule of the Myers case that their duties were predominantly "executive or administrative." The court said:

"The final contention of the appellant is that even though section 4(f) does not reserve to the Congress exclusive right of removal, save only as qualified by section 6, the Authority exercises quasi-legislative powers, and the President is, therefore, without power to remove its members during the terms for which they were appointed, by reason of the decision in the Humphrey case. It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property. Many of these activities, prior to the setting up of the T. V. A., have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in no wise, different, except perhaps in degree, from the duties of any other administrative officers or agencies, or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The Board does not sit in judgment upon private controversies, or controversies between private citizens and the government, and there is no judicial review of its decisions, except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply."

4. On the President's removal power see: Hart, *Tenure of Office Under the Constitution* (1930); Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Col. L. Rev. 353 (1927), a revised version of which is reprinted under the title, *The President's Removal Power Under the Constitution*, in 4 *Selected Essays on Constitutional Law* (1938), 1467; Donovan and Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Corn. L. Q. 215 (1936), 4 *Selected Essays on Constitutional Law* (1938), 1519. Concerning the appointment and removal of federal judges, see Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485, 723, 870 (1930).

## EX PARTE GROSSMAN.

Supreme Court of the United States, 1925.

267 U. S. 87, 69 L. ed. 527, 45 Sup. Ct. 332, 38 A. L. R. 131.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an original petition in this Court for a writ of habeas corpus by Philip Grossman against Ritchie V. Graham, Superintendent of the Chicago House of Correction, Cook County, Illinois. The respondent has answered the rule to show cause. The facts are not in dispute.

On November 24, 1920, the United States filed a bill in equity against Philip Grossman in the District Court of the United States for the Northern District of Illinois, under Section 22 of the National Prohibition Act (Ch. 85, 41 Stat. 305, 314), averring that Grossman was maintaining a nuisance at his place of business in Chicago by sales of liquor in violation of the Act and asking an injunction to abate the same. Two days later the District Judge granted a temporary order. January 11, 1921, an information was filed against Grossman, charging that, after the restraining order had been served on him, he had sold to several persons liquor to be drunk on his premises. He was arrested, tried, found guilty of contempt and sentenced to imprisonment in the Chicago House of Correction for one year and to pay a fine of \$1,000 to the United States and costs. The decree was affirmed by the Circuit Court of Appeals, 280 Fed. 683. In December, 1923, the President issued a pardon in which he commuted the sentence of Grossman to the fine of \$1,000 on condition that the fine be paid. The pardon was accepted, the fine was paid and the defendant was released. In May, 1924, however, the District Court committed Grossman to the Chicago House of Correction to serve the sentence notwithstanding the pardon. 1 Fed. (2d) 941. The only question raised by the pleadings herein is that of the power of the President to grant the pardon. \* \* \*

Article II, Section 2, Clause 1, of the Constitution, dealing with the powers and duties of the President, closes with these words: "\* \* \* and he shall have the power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

The argument for the respondent is that the President's power extends only to offenses against the United States and a contempt of court is not such an offense, that offenses against the United States are not common law offenses but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempts against his courts chiefly because the judges thereof were his agents and acted in his name; that the context of the Constitution shows that the word "offenses" is used in that instrument only to include crimes and misdemeanors triable by jury and not contempts of the dignity and authority of the federal courts, and that to construe the pardon

clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the Legislative, Executive and Judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

In a case presenting the question whether a pardon should be pleaded in bar to be effective, Chief Justice Marshall said of the power of pardon (*United States v. Wilson*, 7 Peters, 150, 160) :

"As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." \* \* \*

The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common-law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. \* \* \*

These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its efficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. *Blackstone I*, 285, 397, 398; *Hawkins, Pleas of the Crown*, 6th Ed. (1787), Vol. 2, 553. \* \* \*

In our own law the same distinction clearly appears. *Gompers v. Bucks Stove & Range Company*, 221 U. S. 418; *Doyle v. London Guarantee Company*, 204 U. S. 599, 607; *Bessette v. Conkey Co.*, 194 U. S. 324; *Alexander v. United States*, 201 U. S. 117; *Union Tool Co. v.*

Wilson, 259 U. S. 107, 109. In the Gompers case this Court points out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions. \* \* \*

We have given the history of the clause to show that the words "for offenses against the United States" were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the States. It cannot be supposed that the Committee on Revision by adding these words, or the Convention by accepting them, intended sub silentio to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution. \* \* \*

Moreover, criminal contempts of a federal court have been pardoned for eighty-five years. \* \* \*

Finally, it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive and judicial powers. This argument influenced the two district judges below. (1 Fed. (2d) 941.) The Circuit Court of Appeals of the Eighth Circuit sustained it in a discussion, though not necessary to the case, in *In re Nevitt*, 117 Fed. 448. \* \* \*

The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The Judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate. By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the Judiciary. The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. *Ex parte Garland*, 4 Wall. 333, 380. Negatively, one House of Congress can withhold all

appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the others is qualified and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule of construction. The fact is that the Judiciary, quite as much as Congress and the Executive, is dependent on the cooperation of the other two, that government may go on. Indeed, while the Constitution has made the Judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look for a continuity of necessary cooperation, in the possible reluctance of either of the other branches, to the force of public opinion.

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery? A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common law origin and long years of practice and acquiescence. \* \* \*

The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? The pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity. \* \* \*

The rule is made absolute and the petitioner is discharged.

#### NOTES

1. "The Constitution provides that the President 'shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.' Art. II, § 2.

"The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

"There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." Mr. Justice Field, speaking for the court in *Ex parte Garland*, 4 Wall. 333, 380, 18 L. ed. 366, 370 (1867).

2. A good discussion of the distinction between criminal and civil contempts is contained in the opinion of Mr. Justice Douglas, speaking for the court, in *Penfield Co. of California v. Securities & Exchange Commission*, 330 U. S. 585, 91 L. ed. 1117, 67 Sup. Ct. 918 (1947), where it was pointed out that it is the nature of the relief asked that is determinative of the nature of the proceeding. Here a proceeding to enforce a subpoena duces tecum issued in an investigation by the Securities and Exchange Commission, in which the only sanction asked was a penalty designed to compel obedience on the part of the witness, was held to be civil in character. "Where a fine or imprisonment imposed on the

contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do' \* \* \* the remedy is one for civil contempt."

3. Questions which have arisen from time to time relating to the President's veto power and the effect of his failure to act upon bills passed by the Congress within the period prescribed by the Constitution (Art. I, § 7, cl. 2) are omitted from consideration. Leading Supreme Court decisions on this topic are: *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 44 L. ed. 223, 20 Sup. Ct. 168 (1899); *Missouri Pac. R. Co. v. Kansas*, 248 U. S. 276, 63 L. ed. 239, 39 Sup. Ct. 93, 2 A. L. R. 1589 (1919); *Okanogan Indians v. United States (Pocket Veto Case)*, 279 U. S. 655, 73 L. ed. 894, 49 Sup. Ct. 463, 64 A. L. R. 1434 (1929); *Edwards v. United States*, 286 U. S. 482, 76 L. ed. 1239, 52 Sup. Ct. 627 (1932); and *Wright v. United States*, 302 U. S. 583, 82 L. ed. 439, 58 Sup. Ct. 395 (1938).

## YOUNGSTOWN SHEET & TUBE CO. v. SAWYER.

Supreme Court of the United States, 1952.

343 U. S. 579, 96 L. ed. 1153, 72 Sup. Ct. 863,

26 A. L. R. (2d) 1378.

MR. JUSTICE BLACK delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to law-making, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. The issue emerges here from the following series of events:

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, United Steelworkers of America, C. I. O., gave notice of an intention to strike when the existing bargaining agreements expired on December 31. Thereupon the Federal Mediation and Conciliation Service intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1951, referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. This Board's report resulted in no settlement. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin

at 12:01 a. m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340, a copy of which is attached at the end of this opinion as an appendix. The order directed the Secretary of Commerce to take possession of and operate most of the steel mills throughout the country. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action. Cong. Rec., April 9, 1952, p. 3962. Twelve days later he sent a second message. Cong. Rec., April 21, 1952, p. 4192. Congress has taken no action.

Obedying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions. The District Court was asked to declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement. Opposing the motion for preliminary injunction, the United States asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had "inherent power" to do what he had done—power "supported by the Constitution, by historical precedent, and by court decisions." The Government also contended that in any event no preliminary injunction should be issued because the companies had made no showing that their available legal remedies were inadequate or that their injuries from seizure would be irreparable. Holding against the Government on all points, the District Court on April 30 issued a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plants \* \* \* and from acting under the purported authority of Executive Order No. 10340." 103 F. Supp. 569. On the same day the Court of Appeals stayed the District Court's injunction. Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the cause for argument on May 12. 343 U. S. 937.

Two crucial issues have developed: *First*. Should final determination of the constitutional validity of the President's order be made in this case which has proceeded no further than the preliminary injunction stage? *Second*. If so, is the seizure order within the constitutional power of the President?

It is urged that there were nonconstitutional grounds upon which the District Court could have denied the preliminary injunction and thus have followed the customary judicial practice of declining to reach and decide constitutional questions until compelled to do so. On this basis it is argued that equity's extraordinary injunctive relief should have been denied because (a) seizure of the companies' properties did not inflict irreparable damages, and (b) there were available legal remedies adequate to afford compensation for any possible damages which they might suffer. While separately argued by the Government, these two contentions are here closely related, if not identical. Arguments as to both rest in large part on the Government's claim that should the seizure ultimately be held unlawful, the companies could recover full compensation in the Court of Claims for the unlawful taking. Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been. See *e. g.*, *Hooe v. United States*, 218 U. S. 322, 335-336; *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 333. But see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 701-702. Moreover, seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement. Viewing the case this way, and in the light of the facts presented, the District Court saw no reason for delaying decision of the constitutional validity of the orders. We agree with the District Court and can see no reason why that question was not ripe for determination on the record presented. We shall therefore consider and determine that question now.

The President's power to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of them. The Government refers to the seizure provisions of one of these statutes (§ 201 (b) of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-

Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, the unions were left free to strike if the majority of the employees, by secret ballot, expressed a desire to do so.

It is clear that if the President had authority to issue the order he did, it must be found in some provisions of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under Article II of the Constitution. Particular reliance is placed on the provisions which say that "the executive Power shall be vested in a President \* \* \*"; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. \* \* \*" After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing

Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

The judgment of the District Court is affirmed. Affirmed.

[Four Justices (FRANKFURTER, DOUGLAS, JACKSON and BURTON) joined in the opinion of the Court by MR. JUSTICE BLACK. Each of these Justices also filed separate concurring opinions, as did MR. JUSTICE CLARK, who concurred in the judgment but not the opinion of the Court. JUSTICES REED and MINTON joined in the dissenting opinion written by MR. CHIEF JUSTICE VINSON. Appendix I is a synoptic analysis of legislation authorizing seizure of industrial property in the United States since 1862. Appendix II is a summary of seizures of industrial plants and facilities by the President, beginning with that of railroads and telegraph lines between Washington and Annapolis in 1861. Because of space limitations, only portions of the separate concurring opinions are included here.]

[The concurring opinion of MR. JUSTICE JACKSON took the view that the President had taken action which was incompatible with the will of Congress, thus leaving his seizure of the mills to be justified

only by any remainder of executive power after subtraction of such power as Congress has over the subject. He said, in part:]

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers. \* \* \*

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. In 1939, upon congressional request, the Attorney General listed ninety-nine such separate statutory grants by Congress of emergency or war-time executive powers. They were invoked from time to time as need appeared. Under this procedure we retain Government by law—special, temporary law, perhaps, but law nonetheless. The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties.

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that

reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extra-constitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, "If he rightly interpret the national thought and boldly insist upon it, he is irresistible. \* \* \* His office is anything he has the sagacity and force to make it." I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.  
\* \* \*

[MR. JUSTICE FRANKFURTER'S concurring opinion was based on the view that the Taft-Hartley Act was designed to prevent seizure by the President. He also discussed and distinguished other nonstatutory seizures. He concluded:]

In adopting the provisions which it did, by the Labor Management Relations Act of 1947, for dealing with a "national emergency" arising out of a breakdown in peaceful industrial relations, Congress was very familiar with Government seizure as a protective measure. On a balance of considerations Congress chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile. In deciding that authority to seize should be given to the President only after full consideration of the particular situation should show such legislation to be necessary, Congress presumably acted on experience with similar industrial conflicts in the past. It evidently assumed that industrial shutdowns in basic industries are not instances of spontaneous generation, and that danger warnings are sufficiently plain before the

event to give ample opportunity to start the legislative process into action. \* \* \*

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. \* \* \*

[Mr. JUSTICE DOUGLAS' concurrence concluded as follows:]

If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency. Article II which vests the "executive Power" in the President defines that power with particularity. Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, Section 3 provides that the President shall "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II, Section 3, also provides that the President "shall take Care that the Laws be faithfully executed." But as Mr. JUSTICE BLACK and Mr. JUSTICE FRANKFURTER point out the power to execute the laws starts and ends with the laws Congress has enacted.

The great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other in the land. It gives a position of leadership that is unique. The power to formulate policies and mould opinion inheres in the Presidency and conditions our national life. The impact of the man and the philosophy he represents may at times be thwarted by the Congress. Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement. Some future generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. We could

not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution.

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.

[MR. JUSTICE BURTON emphasized that neither the procedure authorized by the Taft-Hartley Act nor the substituted procedure used by the President carries any statutory authority for the seizure, which action he viewed as contravening the reserved right of Congress to adopt or reject such a course as a matter of legislative policy. He continued:]

This brings us to a further crucial question. Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war.

The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.

[MR. JUSTICE CLARK's concurrence also pointed out that neither the Defense Production Act of 1950 nor the Taft-Hartley Act gives the President authority to seize plants and that no effort had been made by the government to comply with the procedures established by the Selective Service Act of 1948, which expressly authorizes seizures when producers fail to supply necessary defense matériel. The gist of his position is contained in the following paragraph:]

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in *Little v. Barreme*, 2 Cranch 170, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissenting. \* \* \*

[The dissenting opinion first reviews the grave international and military situation which developed as the aftermath of World War II and the responsibilities assumed by the United States in the world community as the result of the aggression in Korea. It sets forth in full the executive order and the President's message to Congress referred to in the majority opinion. It summarizes evidence supporting the view of Secretary of Defense Lovett that "a work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds." This portion of the opinion concludes with the assertion that "at the time of seizure there was not, and there is not now, the slightest evidence to justify the belief that any strike will be of short duration" and further expresses the view that "if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case."]

The steel mills were seized for a public use. The power of eminent domain, invoked in this case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. *Kohl v. United States*, 91 U. S. 367. Plaintiffs cannot complain that any provision in the Constitution prohibits the exercise of the power of eminent domain in this case. The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." It is no bar to this seizure for, if the taking is not otherwise unlawful, plaintiffs are assured of receiving the required just compensation. *United States v. Pewee Coal Co.*, 341 U. S. 114.

Admitting that the Government could seize the mills, plaintiffs claim that the implied power of eminent domain can be exercised only under an Act of Congress; under no circumstances, they say, can that power be exercised by the President unless he can point to an express provision in enabling legislation. This was the view adopted by the District Judge when he granted the preliminary injunction. Without an answer, without hearing evidence, he determined the issue on the basis of his "fixed conclusion \* \* \* that defendant's acts are illegal" because the President's only course in the face of an emergency is

to present the matter to Congress and await the final passage of legislation which will enable the Government to cope with threatened disaster.

Under this view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action. Under this view, he is left powerless because a power not expressly given to Congress is nevertheless found to rest exclusively with Congress. \* \* \*

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval. \* \* \*

Without declaration of war, President Lincoln took energetic action with the outbreak of the Civil War. He summoned troops and paid them out of the Treasury without appropriation therefor. He proclaimed a naval blockade of the Confederacy and seized ships violating that blockade. Congress, far from denying the validity of these acts, gave them express approval. The most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the Civil War, but wholly without statutory authority.

In an action furnishing a most apt precedent for this case, President Lincoln directed the seizure of rail and telegraph lines leading to Washington without statutory authority. Many months later, Congress recognized and confirmed the power of the President to seize railroads and telegraph lines and provided criminal penalties for interference with Government operation. This Act did not confer on the President any additional powers of seizure. Congress plainly rejected the view that the President's acts had been without legal sanction until ratified by the legislature. Sponsors of the bill declared that its purpose was only to confirm the power which the President already possessed. Opponents insisted a statute authorizing seizure was unnecessary and might even be construed as limiting existing Presidential powers.

Other seizures of private property occurred during the Civil War, just as they had occurred during previous wars. In *United States v. Russell*, 13 Wall. 623, three river steamers were seized by Army Quartermasters on the ground of "imperative military necessity." This Court affirmed an award of compensation. \* \* \*

President Hayes authorized the widespread use of federal troops during the Railroad Strike of 1877. President Cleveland also used

the troops in the Pullman Strike of 1895 and his action is of special significance. No statute authorized this action. No call for help had issued from the Governor of Illinois; indeed Governor Altgeld disclaimed the need for supplemental forces. But the President's concern was that federal laws relating to the free flow of interstate commerce and the mails be continuously and faithfully executed without interruption. To further this aim his agents sought and obtained the injunction upheld by this Court in *In re Debs*, 158 U. S. 564. The Court scrutinized each of the steps taken by the President to insure execution of the "mass of legislation" dealing with commerce and the mails and gave his conduct full approval. Congress likewise took note of this use of Presidential power to forestall apparent obstacles to the faithful execution of the laws. By separate resolutions, both the Senate and the House commended the Executive's action.

President Theodore Roosevelt seriously contemplated seizure of Pennsylvania coal mines if a coal shortage necessitated such action. In his autobiography, President Roosevelt expounded the "Stewardship Theory" of Presidential power stating that "the executive is subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service. Because the contemplated seizure of the coal mines was based on this theory, then ex-President Taft criticized President Roosevelt in a passage in his book relied upon by the District Court in this case. Taft, *Our Chief Magistrate and His Powers* (1915), 139-147. In the same book, however, President Taft agreed that such powers of the President as the duty "to take care that the laws be faithfully executed" could not be confined to "express Congressional statutes." \* \* \*

In 1909, President Taft was informed that government owned oil lands were being patented by private parties at such a rate that public oil lands would be depleted in a matter of months. Although Congress had explicitly provided that these lands were open to purchase by United States citizens, 29 Stat. 526 (1897), the President nevertheless ordered the lands withdrawn from sale "[i]n aid of proposed legislation." In *United States v. Midwest Oil Co.*, 236 U. S. 459, the President's action was sustained as consistent with executive practice throughout our history. \* \* \*

Beginning with the Bank Holiday Proclamation and continuing through World War II, executive leadership and initiative were characteristic of President Franklin D. Roosevelt's administration. In 1939, upon the outbreak of war in Europe, the President proclaimed a limited national emergency for the purpose of strengthening our national defense. By May of 1941, the danger from the Axis belligerents having become clear, the President proclaimed "an unlimited national emergency" calling for mobilization of the Nation's defenses to repel aggression. The President took the initiative in strengthening our

defenses by acquiring rights from the British Government to establish air bases in exchange for over-age destroyers.

In 1941, President Roosevelt acted to protect Iceland from attack by Axis powers when British forces were withdrawn by sending our forces to occupy Iceland. Congress was informed of this action on the same day that our forces reached Iceland. The occupation of Iceland was but one of "at least 125 incidents" in our history in which Presidents, "without Congressional authorization, and in the absence of a declaration of war, [have] ordered the Armed Forces to take action or maintain positions abroad."

Some six months before Pearl Harbor, a dispute at a single aviation plant at Inglewood, California, interrupted a segment of the production of military aircraft. In spite of the comparative insignificance of this work stoppage to total defense production as contrasted with the complete paralysis now threatened by a shutdown of the entire basic steel industry, and even though our armed forces were not then engaged in combat, President Roosevelt ordered the seizure of the plant "pursuant to the powers vested in [him] by the Constitution and laws of the United States, as President of the United States of America and Commander in Chief of the Army and Navy of the United States." The Attorney General (Jackson) vigorously proclaimed that the President had the moral duty to keep this Nation's defense effort a "going concern." \* \* \*

At this time, Senator Connally proposed amending the Selective Service and Training Act to authorize the President to seize any plant where an interruption of production would unduly impede the defense effort. Proponents of the measure in no way implied that the legislation would add to the powers already possessed by the President and the amendment was opposed as unnecessary since the President already had the power. The amendment relating to plant seizures was not approved at that session of Congress.

Meanwhile, and also prior to Pearl Harbor, the President ordered the seizure of a shipbuilding company and an aircraft parts plant. Following the declaration of war, but prior to the Smith-Connally Act of 1943, five additional industrial concerns were seized to avert interruption of needed production. During the same period, the President directed seizure of the Nation's coal mines to remove an obstruction to the effective prosecution of the war.

The procedures adopted by President Roosevelt closely resembled the methods employed by President Wilson. A National War Labor Board, like its predecessor of World War I, was created by Executive Order to deal effectively and fairly with disputes affecting defense production. Seizures were considered necessary, upon disobedience of War Labor Board orders, to assure that the mobilization effort remained a "going concern," and to enforce the economic stabilization program.

At the time of the seizure of the coal mines, Senator Connally's bill to provide a statutory basis for seizures and for the War Labor Board was again before Congress. As stated by its sponsor, the purpose of the bill was not to augment Presidential power, but to "let the country know that the Congress is squarely behind the President." As in the case of the legislative recognition of President Lincoln's power to seize, Congress again recognized that the President already had the necessary power, for there was no intention to "ratify" past actions of doubtful validity. Indeed, when Senator Tydings offered an amendment to the Connally bill expressly to confirm and validate the seizure of the coal mines, sponsors of the bill opposed the amendment as casting doubt on the legality of the seizure and the amendment was defeated. When the Connally bill, S. 796, came before the House, all parts after the enacting clause were stricken and a bill introduced by Representative Smith of Virginia was substituted and passed. This action in the House is significant because the Smith bill did not contain the provisions authorizing seizure by the President but did contain provisions controlling and regulating activities in respect to properties seized by the Government under statute "or otherwise." After a conference, the seizure provisions of the Connally bill, enacted as the Smith-Connally or War Labor Disputes Act of 1943, 57 Stat. 163, were agreed to by the House.

Following passage of the Smith-Connally Act, seizures to assure continued production on the basis of terms recommended by the War Labor Board were based upon that Act as well as upon the President's power under the Constitution and the laws generally. A question did arise as to whether the statutory language relating to "any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials" authorized the seizure of properties of Montgomery Ward & Co., a retail department store and mail order concern. The Attorney General (Biddle) issued an opinion that the President possessed the power to seize Montgomery Ward properties to prevent a work stoppage whether or not the terms of the Smith-Connally Act authorized such a seizure. This opinion was in line with the views on Presidential powers maintained by the Attorney General's predecessors (Murphy and Jackson) and his successor (Clark). Accordingly, the President ordered seizure of the Chicago properties of Montgomery Ward in April, 1944, when that company refused to obey a War Labor Board order concerning the bargaining representative of its employees in Chicago. In Congress, a Select Committee to Investigate Seizure of the Property of Montgomery Ward & Co., assuming that the terms of the Smith-Connally Act did not cover this seizure, concluded that the seizure "was not only within the Constitutional power but was the plain duty of the President." Thereafter, an election determined the bargaining representative for the Chicago employees and the properties were returned to Montgomery

Ward & Co. In December, 1944, after continued defiance of a series of War Labor Board orders, President Roosevelt ordered the seizure of Montgomery Ward properties throughout the country. The Court of Appeals for the Seventh Circuit upheld this seizure on statutory grounds and also indicated its disapproval of a lower court's denial of seizure power apart from express statute.

More recently, President Truman acted to repel aggression by employing our armed forces in Korea. Upon the intervention of the Chinese Communists, the President proclaimed the existence of an unlimited national emergency requiring the speedy build-up of our defense establishment. Congress responded by providing for increased manpower and weapons for our own armed forces, by increasing military aid under the Mutual Security Program and by enacting economic stabilization measures, as previously described.

This is but a cursory summary of executive leadership. But it amply demonstrates that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution. At the minimum, the executive actions reviewed herein sustain the action of the President in this case. \* \* \*

History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required. \* \* \*

Plaintiffs place their primary emphasis on the Labor Management Relations Act of 1947, hereinafter referred to as the Taft-Hartley Act, but do not contend that that Act contains any provision prohibiting seizure. \* \* \*

Plaintiffs admit that the emergency procedures of Taft-Hartley are not mandatory. Nevertheless, plaintiffs apparently argue that, since Congress did provide the 80-day injunction method for dealing with emergency strikes, the President cannot claim that an emergency exists until the procedures of Taft-Hartley have been exhausted. This argument was not the basis of the District Court's opinion and, whatever merit the argument might have had following the enactment of Taft-Hartley, it loses all force when viewed in light of the statutory pattern confronting the President in this case.

In Title V of the Defense Production Act of 1950, Congress stated: "It is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and to maintain uninterrupted production, that there be effective procedures for the settlement of labor disputes affecting national defense." § 501.

Title V authorized the President to initiate labor-management conferences and to take action appropriate to carrying out the recommendations of such conferences and the provisions of Title V. § 502. Due regard is to be given to collective bargaining practice and stabilization policies and no action taken is to be inconsistent with Taft-Hart-

ley and other laws. § 503. The purpose of these provisions was to authorize the President "to establish a board, commission or other agency, similar to the War Labor Board of World War II, to carry out the title."

The President authorized the Wage Stabilization Board (WSB), which administers the wage stabilization functions of Title IV of the Defense Production Act, also to deal with labor disputes affecting the defense program. When extension of the Defense Production Act was before Congress in 1951, the Chairman of the Wage Stabilization Board described in detail the relationship between the Taft-Hartley procedures applicable to labor disputes imperiling the national health and safety and the new WSB dispute procedures especially devised for settlement of labor disputes growing out of the needs of the defense program. Aware that a technique separate from Taft-Hartley had been devised, members of Congress attempted to divest the WSB of its disputes powers. These attempts were defeated in the House, were not brought to a vote in the Senate and the Defense Production Act was extended through June 30, 1952, without change in the disputes powers of the WSB. Certainly this legislative creation of a new procedure for dealing with defense disputes negatives any notion that Congress intended the earlier and discretionary Taft-Hartley procedure to be an exclusive procedure.

Accordingly, as of December 22, 1951, the President had a choice between alternate procedures for settling the threatened strike in the steel mills: one route created to deal with peacetime disputes; the other route specially created to deal with disputes growing out of the defense and stabilization program. There is no question of bypassing a statutory procedure because both of the routes available to the President in December were based upon statutory authorization. Both routes were available in the steel dispute. The Union, by refusing to abide by the defense and stabilization program, could have forced the President to invoke Taft-Hartley at that time to delay the strike a maximum of 80 days. Instead the Union agreed to cooperate with the defense program and submit the dispute to the Wage Stabilization Board.

Plaintiffs had no objection whatever at that time to the President's choice of the WSB route. As a result, the strike was postponed, a WSB panel held hearings and reported the position of the parties and the WSB recommended the terms of a settlement which it found were fair and equitable. Moreover, the WSB performed a function which the board of inquiry contemplated by Taft-Hartley could not have accomplished when it checked the recommended wage settlement against its own wage stabilization regulations issued pursuant to its stabilization functions under Title IV of the Defense Production Act. Thereafter, the parties bargained on the basis of the WSB recommendation.

When the President acted on April 8, he had exhausted the procedures for settlement available to him. Taft-Hartley was a route parallel to, not connected with, the WSB procedure. The strike had been delayed 99 days as contrasted with the maximum delay of 80 days under Taft-Hartley. There had been a hearing on the issues in dispute and bargaining which promised settlement up to the very hour before seizure had broken down. Faced with immediate national peril through stoppage of steel production on the one hand and faced with destruction of the wage and price legislative programs on the other, the President took temporary possession of the steel mills as the only course open to him consistent with his duty to take care that the laws be faithfully executed.

Plaintiffs' property was taken and placed in the possession of the Secretary of Commerce to prevent any interruption in steel production. It made no difference whether the stoppage was caused by a union-management dispute over terms and conditions of employment, a union-Government dispute over wage stabilization or a management-Government dispute over price stabilization. The President's action has thus far been effective, not in settling the dispute, but in saving the various legislative programs at stake from destruction until Congress could act in the matter.

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency for, under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law.

Seizure of plaintiffs' property is not a pleasant undertaking. Similarly unpleasant to a free country are the draft which disrupts the home and military procurement which causes economic dislocation and compels adoption of price controls, wage stabilization and allocation of materials. The President informed Congress that even a temporary Government operation of plaintiffs' properties was "thoroughly distasteful" to him, but was necessary to prevent immediate paralysis of the mobilization program. Presidents have been in the past, and

any man worthy of the Office should be in the future, free to take at least interim action necessary to execute legislative programs essential to survival of the Nation. A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, "to take Care that the Laws be faithfully executed." \* \* \*

## NOTES

1. *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75 (1852), involving seizure of a wagon train by an officer of the United States Army during the Mexican War, noted that such executive seizure was proper in case of emergency, but affirmed a personal judgment against the officer of \$90,000 on the ground that no emergency had been found to exist. The judgment was paid by the United States pursuant to Act of Congress passed before the court's decision. The court said that executive takings, free from personal liability, were permissible only where "the danger is immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for." It is to be noted that this case was decided before the establishment of the Court of Claims.

2. For a recent discussion of executive power during a period of emergency, see Comment, National Emergencies and the President's Inherent Powers, 2 *Stanf. L. Rev.* 303 (1950). See also, Corwin, *The President: Office and Powers* (3d rev. ed., 1948), 182-193; Lea, *The Steel Case: Presidential Seizure of Private Industry*, 47 *Northwestern U. L. Rev.* 289 (1952).

3. In *Sterling v. Constantin*, 287 U. S. 378, 77 L. ed. 375, 53 Sup. Ct. 190 (1932) the Supreme Court, in a unanimous opinion by Chief Justice Hughes, upheld the decree of a three-judge district court enjoining the Governor of Texas and the military authorities from enforcing their military or executive orders regulating or restricting the production of oil from complainants' wells, pursuant to a previously declared state of martial law. The decision is important in that it imposed for the first time a definite restriction upon the powers of state governors exercised under declarations of martial law. The case is discussed in Hendel, *Charles Evans Hughes and the Supreme Court* (1951), 118-122. See also, Fairman, *Martial Rule, in the Light of Sterling v. Constantin*, 19 *Corn. L. Q.* 20 (1933).

UNITED STATES v. CURTISS-WRIGHT  
EXPORT CORPORATION.

Supreme Court of the United States, 1936.  
299 U. S. 304, 81 L. ed. 255, 57 Sup. Ct. 216.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with the 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions

of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. The Joint Resolution (chap. 365, 48 Stat. at L. 811) follows:

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company or association acting in the interest of either country, until otherwise ordered by the President or by Congress.*

*"Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding \$10,000 or by imprisonment not exceeding two years, or both."*

\* \* \*

Appellees severally demurred to the first count of the indictment on the grounds (1) that it did not charge facts sufficient to show the commission by appellees of any offense against any law of the United States; (2) that this count of the indictment charges a conspiracy to violate the joint resolution and the Presidential proclamation, both of which had expired according to the terms of the joint resolution by reason of the revocation contained in the Presidential proclamation of November 14, 1935, and were not in force at the time when the indictment was found. The points urged in support of the demurrers were, first, that the joint resolution effects an invalid delegation of legislative power to the Executive; second, that the joint resolution never became effective because of the failure of the President to find essential jurisdictional facts; and third, that the second proclamation operated to put an end to the alleged liability under the joint resolution.

The court below sustained the demurrers upon the first point, but overruled them on the second and third points. 14 F. Supp. 230. The government appealed to this Court under the provisions of the Criminal Appeals Act of March 2, 1907, 34 Stat. at L. 1246, chap. 2564, as amended, 18 U. S. C. § 682. That act authorizes the United States to appeal from a district court direct to this Court in criminal cases where, among other things, the decision sustaining a demurrer to the

indictment or any count thereof is based upon the invalidity or construction of the statute upon which the indictment is founded.

*First.* It is contended that by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the re-establishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion; and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumeration still in the states. *Carter v. Carter Coal Co.*, 298 U.S. 238, 294. That this doctrine applies only to powers which the states had, is self-evident. And since the states

severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See *Penhallow v. Doane*, 3 Dall. 54, 80, 81. That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Britannic Majesty and the "United States of America." 8 Stat. at L. — *European Treaties* — 80.

The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. \* \* \*

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356;) and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member

of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones v. United States*, 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting v. United States*, 149 U. S. 698, 705 et seq.), the power to make such international agreements as do not constitute treaties in the constitutional sense (*S. Altman & Co. v. United States*, 224 U. S. 583, 600, 601; *Crandall, Treaties, Their Making and Enforcement*, 2d ed. p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the Court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations. \* \* \*

Not only, as we have shown, is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Annals*, 6th Cong., col. 613. \* \* \*

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in

the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:

“The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.” 1 Messages and Papers of the Presidents, p. 194. \* \* \*

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day. \* \* \*

The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.

We deem it unnecessary to consider, seriatim, the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject. \* \* \* [The Court next held that

the Executive proclamation satisfied the requirements of the Joint Resolution.]

The judgment of the court below must be reversed and the cause remanded for further proceedings in accordance with the foregoing opinion. Reversed.

MR. JUSTICE McREYNOLDS does not agree. He is of opinion that the court below reached the right conclusion and its judgment ought to be affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

#### NOTES

1. The role of Mr. Justice Sutherland in winning the approval of the court for the view, first advanced in 1792, that the national government does not get its powers to wage war and conduct its foreign relations from the Constitution but possesses them as an inherent attribute of national sovereignty is interestingly discussed in Paschal, *Mr. Justice Sutherland: A Man Against the State* (1951), 221-232. The significance of the opinion lies not alone in the fact that it advances a theory of the foreign relations power which seems to render it independent of constitutional restraints but that it confirms the vast authority of the President in the international sphere. For further analysis and criticism of the Curtiss-Wright case see Patterson, *In re The United States v. Curtiss-Wright Corporation*, 22 Tex. L. Rev. 286, 445 (1944); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L. J. 467 (1946).

2. On the powers of the President to make executive international agreements without submitting them to the Senate, see *United States v. Belmont*, 301 U. S. 324, 81 L. ed. 1134, 57 Sup. Ct. 758 (1937), and *United States v. Pink*, 315 U. S. 203, 86 L. ed. 796, 62 Sup. Ct. 552 (1942). See also, Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 Yale L. J. 664 (1944); McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements; Interchangeable Instruments of National Policy*, 54 Yale L. J. 181, 534 (1945); Borchard, *Treaties and Executive Agreements—A Reply*, 54 Yale L. J. 616 (1945).

#### MISSOURI v. HOLLAND.

Supreme Court of United States, 1920.

252 U. S. 416, 64 L. ed. 641, 40 Sup. Ct. 382, 11 A. L. R. 984.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the states by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the state and contravene its will manifested in statutes. The state also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise,

admitted by the government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a state. *Kansas v. Colorado*, 185 U. S. 125, 142. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237. *Marshall Dental Manufacturing Co. v. Iowa*, 226 U. S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. *Accord, United States v. Thompson*, 258 Fed. Rep. 257; *United States v. Rockefeller*, 260 Fed. Rep. 346. The state appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the states had been held bad in the District Court. *United States v. Shauver*, 214 Fed.

Rep. 154. *United States v. McCullagh*, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U. S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The state as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the

beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state and in a week a thousand miles away. If we are to be accurate we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states and as many of them deal with matters which in the silence of such laws the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." *Baldwin v. Franks*, 120 U. S. 678, 683. No doubt the great body of private relations usually fall within the control of the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch, 454, with regard to statutes of limitations, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the state in *Chirac v. Chirac*, 2 Wheat. 259, 275; *Hauenstein v. Lynham*, 100 U. S. 483; *De-Geofroy v. Riggs*, 133 U. S. 258; *Blythe v. Hinckley*, 180 U. S. 333, 340. So as to limited jurisdiction of foreign consuls within a state. *Wildenhus's Case*, 120 U. S. 1. See *Ross v. McIntyre*, 140 U. S. 453. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitory within the state and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U. S. 118.

Decree affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

## ASAKURA v. SEATTLE.

Supreme Court of the United States, 1924.  
265 U. S. 332, 68 L. ed. 1041, 44 Sup. Ct. 515.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error is a subject of the emperor of Japan, and since 1904 has resided in Seattle, Washington. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker, and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides "that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the superior court of King county, Washington, against the city, its comptroller, and chief of police, to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504; violates the constitution of the State of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about \$5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The superior court granted the relief prayed. On appeal, the supreme court of the state held the ordinance valid and reversed the decree. The case is here on writ of error under § 237 of the Judicial Code.

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions: "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. \* \* \* The citizens or subjects of each \* \* \* shall receive, in the territories of the other, the most constant protection and security for their persons and property, \* \* \*."

A treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Const., Art. VI, § 2.

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend

"so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations. *DeGeofroy v. Riggs*, 133 U. S. 258, 266, 267; *In re Ross*, 140 U. S. 453, 463; *Missouri v. Holland*, 252 U. S. 416. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the State of Washington. *Baldwin v. Franks*, 120 U. S. 678, 682, 683. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. *Foster v. Neilson*, 2 Pet. 253, 314; *Head, Money Cases*, 112 U. S. 580, 598; *Chew Heong v. United States*, 112 U. S. 536, 540; *Whitney v. Robertson*, 124 U. S. 190, 194; *Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272.

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

\* \* \*

By definition contained in the ordinance, pawnbrokers are regarded as carrying on a "business." \* \* \* In this country, the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the states provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not, on that account, to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above-quoted provision, and it must be held that such business is "trade" within the meaning of the treaty. The ordinance violates the treaty. \* \* \* We need not consider other grounds upon which it is attacked.

Decree reversed.

## NOTES

1. The treaty-making power belongs exclusively to the federal government, since the Constitution expressly delegates the power to the President and the Senate (Art. II, § 2, cl. 2) and prohibits its exercise by the states (Art. I, § 10, cl. 1). Treaties made "under the authority of the United States" are "the supreme law of the land" and hence stand on a parity in this respect with acts of Congress (Art. VI, cl. 2). In the event of a conflict between a treaty and an act of Congress, the last in point of time is controlling. In *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. 247 (1884), Mr. Justice Miller, discussing the validity of an act of Congress imposing upon vessel owners a tax of fifty cents for each alien passenger brought into the United States from foreign ports, which act was assumed to violate provisions of treaties with foreign countries, said: "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law which makes it irrevocable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity."

2. A valid treaty supersedes state law in conflict therewith, whether such state law arises from the state's Constitution, statutes or common law. See, in addition to the principal case, *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628 (1880), where the rights of Swiss citizens to inherit Virginia real estate, which had been guaranteed under a treaty of the United States, were held not defeasible by a state statute under which lands of aliens dying intestate escheated to the state.

In *Sei Fujii v. California*, 97 A. C. A. 154, 718, 217 Pac. (2d) 481, 218 Pac. (2d) 595 (1950) a California district court of appeal held the California Alien Land Law, which denied to alien Japanese the right to own any legal or beneficial interest in agricultural land, to be no longer enforceable because it was in conflict with the Charter of the United Nations. Two years later, in the same litigation, the Supreme Court of California reached the same result as had the lower court but based its decision on the Fourteenth Amendment of the United States Constitution rather than on the Charter of the United Nations. *Sei Fujii v. California*, 38 Cal. (2d) 718, 242 Pac. (2d) 617 (1952). The court held that the provisions of Articles 55 and 56 of the Charter, pledging member nations to promote observance of human rights and fundamental freedoms without distinction as to race, sex, language or religion, are not self-executing, since they lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately on ratification, and instead are framed as a promise of future action by the member nations. Consequently, the court concluded that the charter provisions relied on were not intended to supersede existing domestic legislation and did not operate to invalidate the challenged statute.

3. In *De Geofroy v. Riggs*, 133 U. S. 258, 266-267, 33 L. ed. 642, 10 Sup. Ct. 295 (1890), Mr. Justice Field said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries. \* \* \* The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in

that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. \* \* \* But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

4. For general discussions of the scope of the treaty-making power, see Corwin, *National Supremacy: Treaty-Power v. State Power* (1913); Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 Col. L. Rev. 172 (1907), 3 *Selected Essays on Constitutional Law* (1938), 397; Boyd, *The Expanding Treaty Power*, 6 N. Car. L. Rev. 428 (1928), 3 *Selected Essays on Constitutional Law* (1938), 410; Magnusson, *Our Membership in the United Nations and the Federal Treaty Power Under the Constitution*, 34 Va. L. Rev. 137 (1948). Recent proposals to limit the treaty-making power by Constitutional amendment have produced a voluminous literature. Among the reports and articles on both sides of this issue may be noted the following: Reports of Standing Committee on Peace and Law Through United Nations of the American Bar Association, September 1, 1951, February 1, 1952, September 1, 1952, February 1, 1953; Chafee, *Amending the Constitution to Cripple Treaties*, 12 La. L. Rev. 345 (1952); Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305 (1952); Chafee, *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution*, 38 A. B. A. J. 731 (1952); Symposium: Deutsch, Finch, Call, Dillard, Wright, *Should the Constitution Be Amended to Limit the Treaty-Making Power*, 26 So. Cal. L. Rev. 347 (1953); Dean, *The Bricker Amendment and Authority Over Foreign Affairs*, 32 *Foreign Affairs* 1 (Oct., 1953).

### Section 3.—The Legislative Department.

#### MCGRAIN v. DAUGHERTY.

Supreme Court of the United States, 1927.

273 U. S. 135, 71 L. ed. 580, 47 Sup. Ct. 319, 50 A. L. R. 1.

[Appeal from the United States District Court for the Southern District of Ohio which had on habeas corpus discharged the witness referred to in the opinion below. The facts are sufficiently stated in the portions of the opinion printed below, except that the investigation which the committee of the Senate was conducting into charges of neglect of duty raised against Harry M. Daugherty, Attorney General of the United States, was ordered by a Senate resolution, authorizing the committee to subpoena witnesses.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

\* \* \*

In the course of the investigation the committee issued and caused to be duly served on Mally S. Daugherty—who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio,—a subpoena commanding him to appear

before the committee for the purpose of giving testimony bearing on the subject under investigation, \* \* \*.

The committee then made a report to the Senate stating that the subpoena had been issued, that according to the officer's return—copies of which accompanied the report—the witness was personally served; and that he had failed and refused to appear. After a reading of the report, the Senate adopted a resolution reciting these facts and proceeding as follows:

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

"Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate." \* \* \*

The warrant was issued agreeably to the resolution and was addressed simply to the Sergeant at Arms. That officer on receiving the warrant endorsed thereon a direction that it be executed by John J. McGrain, already his deputy, and delivered it to him for execution.

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio, with the purpose of bringing him before the bar of the Senate as commanded; whereupon the witness petitioned the federal district court in Cincinnati for a writ of habeas corpus. The writ was granted and the deputy made due return setting forth the warrant and the cause of the detention. After a hearing the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate in directing the investigation and in ordering the attachment exceeded its powers under the Constitution, 299 Fed. 620. The deputy prayed and was allowed a direct appeal to this Court under § 238 of the Judicial Code as then existing.  
\* \* \*

The committee was acting for the Senate and under its authorization; and therefore the subpoenas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpoenas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction it was at liberty to do so. \* \* \*

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with “all legislative powers” granted to the United States, and with power “to make all laws which shall be necessary and proper” for carrying into execution these powers and “all other powers” vested by the Constitution in the United States or in any department or officer thereof. Art. I, secs. 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. Art. I, secs. 2, 3, 5, 7. But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures. \* \* \*

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose. \* \* \*

The latest case is *Marshall v. Gordon*, 243 U. S. 521. The question there was whether the House of Representatives exceeded its power in punishing, as for a contempt of its authority, a person—not a member—who had written, published and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. Power to make inquiries and obtain evidence by compulsory process was not involved. The Court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in *Anderson v. Dunn*, 6 Wheat. 204, but held that its action in this instance was without constitutional justification. The decision was put on the ground that the letter, while offensive and vexatious, was not calculated or likely to affect the House in any of its proceedings or in the exercise of any of its functions—in short, that the act which was punished as a contempt was not of such a character as to bring it within the rule that an express

power draws after it others which are necessary and appropriate to give effect to it. \* \* \*

With this review of the legislative practice, congressional enactments and court decisions, we proceed to a statement of our conclusions on the question.

We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. \* \* \* A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

The contention is earnestly made on behalf of the witness that the power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*, 103 U. S. 168, and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman*, 166 U. S. 661, that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative. \* \* \*

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes. \* \* \*

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment. \* \* \*

What has been said requires that the final order in the district court discharging the witness from custody be reversed.

Final order reversed.

MR. JUSTICE STONE did not participate in the consideration or decision of the case.

### JURNEY v. MACCRACKEN.

Supreme Court of the United States, 1935.  
294 U. S. 125, 79 L. ed. 802, 55 Sup. Ct. 375.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This petition for a writ of habeas corpus was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Journey, the Sergeant at Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District, with directions to discharge the prisoner from custody. 63 App. D. C. 342, 72 F. 2d 560. This Court granted certiorari because of the importance of the question presented. 293 U. S. 543.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givven, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an inquiry which it had the constitutional power to make; that the committee had authority to require the production of papers as a necessary incident of the power

of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain v. Daugherty*, 273 U. S. 135. No question is raised as to the propriety of the scope of the subpoena duces tecum, or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional averments essential to the decision of the question presented are, in substance, these: The Senate had appointed the special committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail." MacCracken had been served, on January 31, 1934, with a subpoena duces tecum to appear "instantly" before the committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he is a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the committee, telegraphed to each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1, produced all the papers relating to the business of the clients who had so consented.

On February 2, before the committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1 he personally permitted Given, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized him to take therefrom papers which did not relate to air mail contracts. Given, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice president of Northwest Airways, Inc., without MacCracken's

knowledge, requested and received from his partner Lee permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a waste paper basket.

Upon the conclusion of MacCracken's testimony on February 2, the committee decided that none of the papers in his possession could be withheld under the claim of privilege. Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the committee all the papers then remaining in the files. On February 3 (after a request therefor by MacCracken), Given restored to the files what he stated were all the papers taken by him. The petition does not allege that any of the papers taken by Brittin were later produced. It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States, "to the best of his ability, knowledge and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 \* \* \* all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely qua punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the Legislature. There may be lack of power, because, as in *Kilbourn v. Thompson*, 103 U. S. 168, there was no legislative duty to be performed, or because, as in *Marshall v. Gordon*, 243 U. S. 521, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been

exercised on several occasions. It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies. In *Anderson v. Dunn*, 6 Wheat. 204, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in *Marshall v. Gordon*, *supra*, upon which MacCracken relies, must be read in the light of the particular facts. It was there recognized that the only jurisdictional test to be applied by the court is the character of the offense; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means. Compare *Ex parte Nugent*, Fed. Cas. No. 10,375; *Stewart v. Blaine*, 1 MacArth. 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned, not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power. The ground for such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, *Kilbourn v. Thompson*, *supra*; and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes, *Marshall v. Gordon*, *supra*.

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, Rev. St. § 102, 2 U. S. C. § 192, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair v. United States*, 279 U. S. 263. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses. That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman*, 166 U. S. 661, 671, 672: "We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any dele-

gation of the power in each to punish for contempt was involved, and that the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. Compare *Ex parte Hudgings*, 249 U. S. 378, 382. As was said in *In re Chapman*, *supra*, "the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu*, and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry v. United States ex rel. Cunningham*, 279 U. S. 597; *Henry v. Henkel*, 235 U. S. 219; *Re Gregory*, 219 U. S. 210.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of this case.

#### NOTES

1. The legitimate functions of Congressional investigating committees have been set forth traditionally as follows: (1) to seek information that will enable Congress to legislate more effectively and wisely; (2) to restrain the activities of administrative officers and agencies, particularly with respect to the enforcement of law and the expenditure of public funds; and (3) to inform the public on matters of governmental interest and thereby attempt to influence public opinion.

2. The statute discussed in *Journey v. MacCracken* (2 U. S. C. § 192 *et seq.*; F. C. A. § 192 *et seq.*) sets up procedure for the punishment of contempts of

Congress through the instrumentality of the federal courts. As the opinion makes clear, this statutory procedure merely supplements the power which Congress itself possesses to punish contempts by direct proceedings. In a legislative contempt proceeding either house of Congress involved convenes as a court to try the contempt and, upon conviction, directs imprisonment by its sergeant-at-arms. Although such power is judicial in character, its exercise by Congress is not considered to violate the principle of separation of powers. It is justified as an appropriate means of vindicating the privilege of requiring the production of evidence. The power is limited in its duration to the time of the adjournment of Congress and the punishment is limited to imprisonment. For an annotation on this power see 79 L. ed. 809 (1935). See also, 50 A. L. R. 21 (1927); 65 A. L. R. 1518 (1930).

3. The statutory procedure noted above has been used in aid of many recent Congressional investigations. Its constitutionality was upheld in *In re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. 677 (1897). Section 192 makes it a misdemeanor for any person summoned as a witness by the authority of either house of Congress to refuse to give testimony or to produce papers upon any matter before either house or any committee thereof. If the person defaults, or having appeared, refuses to answer any question "pertinent to the question under inquiry" he is liable upon conviction to a fine and jail sentence. Section 194 provides that upon failure of the person to testify, Congress shall certify the facts to the appropriate United States attorney, "whose duty it shall be to bring the matter before the grand jury for its action." Section 193 provides that "no witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either house of Congress \* \* \* or by any committee of either house, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." No testimony given at such hearings "shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony." (18 U. S. C. § 3486; F. C. A. 18 § 3486.) However, this section expressly excepts official papers or records produced by the witness from the privilege. In *Adams v. Maryland*, 347 U. S. 179, 98 L. ed. 608, 74 Sup. Ct. 442 (1954) it was held that this section bars use of committee testimony in the state courts as well as in federal courts.

4. Does the Constitution impose any limitation upon the scope of Congressional investigations? The only restrictive decision of the Supreme Court (save those involving the right of the witness safeguarded by the Fifth Amendment to refuse to testify on the ground of compulsory self-incrimination, which are dealt with elsewhere in this volume) is *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377 (1880). Here the court held invalid an investigation into the possible losses of the United States on the failure of *Jay Cooke & Co.*, also upholding an action for false imprisonment brought by a recalcitrant witness against the Sergeant-at-Arms of the House of Representatives. Speaking for the court, Mr. Justice Miller said that "we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." The opinion also states that the inquiry related to "a matter wherein relief or redress could be had only by a judicial proceeding" and hence did not come within the range of Congressional power. Although the opinion in *McGrain v. Daugherty* attempts to distinguish the problem involved there from the issues in the *Kilbourn* case, the reasoning of the two opinions does not seem to be consistent. It has indeed been suggested that the *Kilbourn* decision was in effect overruled by *McGrain v. Daugherty* [Hurst, *The Growth of American Law* (1950), 35], but it has recently been cited with approval by the court in *Tenney v. Brandhove*, *infra*, as

applicable to situations where Congress acts "outside its legislative role." For a recent analysis and criticism of the Kilbourn case, see Morgan, Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited, 37 Cal. L. Rev. 556 (1949). For an earlier study, see Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926).

5. Attempts in recent years by committees of the House and Senate to inquire into the activities of subversive groups have provoked much controversy and raised important constitutional questions. The most controversial of these investigating committees has been the House Committee on Un-American Activities, formerly known as the "Dies Committee," from the name of its first chairman. Established as a select committee in 1938 to investigate "the extent, character, and objects of un-American propaganda activities in the United States" and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin," it was continued by each Congress until 1946, when it achieved permanent status under the Legislative Reorganization Act. The Committee has conducted investigations and issued reports on such matters as the alleged infiltration of Communists into the government service, labor unions, the motion picture industry, peace organizations and the like; the extent of Communist espionage in the atomic energy field, the Department of State and other "sensitive" areas of the federal government; and the spread of Communist propaganda by other groups and individuals claimed to be subversive. The Committee has also submitted lists of allegedly subversive organizations and individuals, based upon the reports of its own investigators and testimony given at its hearings.

May a committee of the House or Senate investigating such activities and propaganda, consistently with the guaranties of the First Amendment, inquire into the private political beliefs and associations of a witness? May it inquire whether the witness was or is a believer in the Communist ideology or a member of the Communist Party? May a witness under subpoena refuse to take the oath on the ground that the committee proposes to inquire into his "private affairs" and to interfere with his freedom of political association? Is the witness free to refuse on the ground that the committee has recommended but little legislation and consequently is not functioning in aid of the legislative process? May a committee require a witness who is an official of an organization under investigation for alleged subversive activities to produce the books and papers of the organization? The case which follows, Barsky v. United States, and the notes which follow that opinion, shed light on these and similar questions.

# BARSKY v. UNITED STATES.

United States Court of Appeals, District of Columbia, 1948.  
167 F. (2d) 241, 83 App. D. C. 127.

PRETTYMAN, ASSOCIATE JUSTICE. \* \* \*

These appellants were indicted, tried before a jury, convicted, and sentenced for willful failure to produce records before a committee of the Congress pursuant to subpoenas, in violation of Section 192 of Title 2 of the United States Code; F. C. A. 2 § 192. The indictment alleged that appellants were members of the governing body of an unincorporated association known as the Joint Anti-Fascist Refugee Committee and that, having been subpoenaed by the Congressional Committee known as the Committee on Un-American Activities of the House of Representatives, to produce the records of their association relating

to the receipt and disbursement of certain money and certain correspondence with persons in foreign countries, they willfully failed to produce these documents.

Upon the trial it was shown that the Congressional Committee existed by virtue of House Resolution No. 5 of the 79th Congress, and that the Joint Anti-Fascist Refugee Committee was a private voluntary association engaged in the collection of funds from the public in this country upon representations that such funds were to be used for relief purposes abroad, and in the disbursement of those funds in foreign countries. It was further shown that the Congressional Committee had received "a large number" of complaints that the funds collected by appellants' organization were being used for political propaganda and not for relief.

It made inquiry of the President's War Relief Control Board and, consistently with suggestions there obtained, requested that one of its investigators be permitted to examine the records of the collection and disbursement of the funds. This request was denied. Testimony, including that of an official of the State Department and a person who said that she had observed the operation of appellants' association abroad, was taken. In effect, this testimony sustained the burden of the complaints. Thereupon the Committee issued the subpoenas above described. Appellants appeared before the Committee but declined to produce, or to cause the production of, the described books and documents. They were thereupon indicted, as above described, and appealed from the judgments upon conviction.

Appellant's first point is that the Resolution creating the Congressional Committee was unconstitutional because it authorized inquiry into political opinion and expression, in violation of the First Amendment.

The Resolution which created this Congressional Committee authorized it by one of three subclauses to investigate "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."

These appellants were not asked to state their political opinions. They were asked to account for funds. We are unable to visualize the particular in which civil rights are violated by a requirement that persons who collect funds from the public in this country for relief purposes abroad account for the collection and distribution of such funds. Moreover, the fact of the existence of such official bodies as U. N. R. R. A. and the President's War Relief Control Board, and the then-pending proposals for loans to foreign governments, clearly justified Congressional inquiry into the disbursement abroad of private funds collected in this country avowedly for relief but reasonably represented as being spent for political purposes in Europe.

Appellants' point is not premised upon the specific question asked them but upon the scope of possible inquiry under the Resolution. So we examine the contention in the light of the possibility, indicated by the preliminary data before the Committee, that answers to the inquiry might reveal that appellants were believers in Communism or members of the Communist Party.

The problem thus presented is difficult and delicate. In it we have not only the frequent "real problem of balancing the public interest against private security," but in this instance we must do so in the midst of swirling currents of public emotion in both directions. We are presented with extreme declarations in respect to Communists and equally extreme declarations in respect to the Congressional Committee. The duty of the courts is no less than to render judgment with utter detachment. \* \* \*

We think that even if the inquiry here had been such as to elicit the answer that the witness was a believer in Communism or a member of the Communist Party, Congress had power to make the inquiry.

The first phase of the question thus posed concerns the power of the Congress to inquire into the subject described in the above quotation from the Resolution.

Preliminary inquiry has from the earliest times been considered an essential of the legislative process. By it are to be determined both the advisability for and the content of legislation. So that even as to ordinary subjects, the power of inquiry by the legislature is coextensive with the power of legislation and is not limited to the scope or the content of contemplated legislation. Constitutional legislation might ensue from information derived by an inquiry upon the subject described in the quotation from H. F. Res. No. 5. That potentiality is the measure of the power of inquiry. The fact is that at least eight legislative proposals have been submitted to the Congress by this Committee as the result of its investigations. Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry. \* \* \*

The existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself. Moreover, the process whereby a change in the form of government can be accomplished has been prescribed by the people in the same document which records the establishment of the presently existing machinery, and that process requires the Congress to initiate proposed amendments. We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part, and inquiry into the desirability vel non of other forms of government

is a power of Congress under its mandate to initiate amendments if such become advisable.

Moreover, Congress is charged with part of the responsibility imposed upon the federal government by that clause of the Constitution which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government." Art. 4, § 4. This clause alone would supply the authority for Congressional inquiry, into potential threats to the republican forms of the governments of the States.

If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject. Moreover, the accuracy of the information obtained depends in large part upon the knowledge and the attitude of the witness, whether present before the Committee or represented by the testimony of another. We note at this point that the arguments directed to the invalidity of this inquiry under the First Amendment would apply to an inquiry directed to another person as well as to one directed to the individual himself. The right to refuse self-incrimination is not involved. The problem relates to the power of inquiry into a matter which is not a violation of law.

The Congressional power of inquiry is not unrestricted. One obvious limitation upon this particular sort of inquiry is that some reasonable cause for concern must appear. We are referred to the "clear and present danger" rule expressed by Mr. Justice Holmes in *Schenck v. United States*, 249 U. S. 47, 52, and extending through the line of cases cited and discussed in *Bridges v. California*, 314 U. S. 252. But all those cases dealt with statutes which actually imposed a restriction upon speech or publication. In our view, it would be sheer folly as a matter of government policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present. And for the judicial branch of government to hold the legislative branch to be without power to make such inquiry until the danger is clear and present, would be absurd. How, except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when danger is clear and present, but the former is when danger is reasonably represented as potential.

There was justification here, within the bounds of the foregoing restriction, for the exercise of the power of inquiry. The President, pursuant to the constitutional requirement that "He shall from time to time give to the Congress Information of the State of the Union" (Art. II, § 3), has announced to the Congress the conclusion that aggressive tend-

encies of totalitarian regimes imposed on free peoples threaten the security of the United States, and he mentioned the activities of Communists in that connection. That proposition underlies much of the current foreign policy of the Government. It is also the premise upon which much important legislation is now pending. \* \* \*

Moreover, that the governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the federal Constitution and guaranteed by it to the States, is explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject. \* \* \*

Appellants argue that since an answer that the witness is a Communist would subject him to embarrassment and damage, the asking of the question is an unconstitutional burden upon free speech. It is no doubt true that public revelation at the present time of Communist belief and activity on the part of an individual would result in embarrassment and damage. This result would not occur because of the Congressional act itself; that is, the Congress is not imposing a liability, or attaching by direct enactment a stigma. The result would flow from the current unpopularity of the revealed belief and activity. Contra, it is suggested that since the pressure of unpopularity affects only sensitive or timid people, there need be less concern, on the theory that democratic processes must necessarily contemplate rugged courage on the part of those who hold convictions, or even beliefs, on government. But it is true, realistically, that even one fully equipped to formulate a personal preference for a system of government at odds in basic respects with that presently existing, may be deterred from his conclusion by fear of, or distaste for, the unpopularity attached to it. We proceed upon the theory that even the most timid and sensitive cannot be unconstitutionally restrained in the freedom of his thought. But this consideration does not solve the problem, because the problem is the relative necessity of the public interest as against the private rights. Even assuming private rights of the timid to be of the fullest weight, the problem remains whether they outweigh the public necessities in this matter. That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox but, in the world as it happens to be, is a realistic problem requiring a practical answer. That invasion should never occur except upon necessity, but unless democratic government (by which we mean government premised upon individual human rights) can protect itself by means commensurate with danger, it is doomed. That it cannot do so is the hope of its opponents, the query of its skeptics, the fear of its supporters. While we will not give less consideration to the private rights involved because they may be those of the more sensitive or less courageous, on the other hand we cannot say that merely because those affected are of less courage or greater sensi-

tivity than the average, therefore the public interest must be waived or given less consideration. \* \* \*

Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views. But such matters are not for the courts. \* \* \*

We hold that in view of the representations to the Congress as to the nature, purposes and program of Communism and the Communist Party, and in view of the legislation proposed, pending and possible in respect to or premised upon that subject, and in view of the involvement of that subject in the foreign policy of the Government, Congress has power to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party. And we further hold that the provision we have quoted from House Resolution No. 5 is sufficiently clear, definite and authoritative to permit this particular Committee to make that particular inquiry. We hold no more than that. \* \* \*

It follows that the judgments of the District Court must be, and they are

Affirmed.

EDGERTON, ASSOCIATE JUSTICE (dissenting).

In my opinion the House Committee's investigation abridges freedom of speech and inflicts punishment without trial; and the statute the appellants are convicted of violating provides no ascertainable standard of guilt. It follows that the convictions should be reversed on constitutional grounds.

The First Amendment forbids Congress to make any law "abridging the freedom of speech, or of the press." If this "is to mean anything, it must restrict powers which are \* \* \* granted by the Constitution to Congress." Legislation abridging the freedoms guaranteed by the First Amendment is not made valid by the fact that it would be valid if it did not abridge them. \* \* \*

The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.

The investigation also restricts freedom of speech by forcing people to express views. Freedom of speech is freedom in respect to speech and includes freedom not to speak. \* \* \* Witnesses before the House Committee are under pressure to profess approved beliefs. They cannot express others without exposing themselves to disastrous

consequences. Yet if they have previously expressed others they cannot creditably or credibly profess those that are approved. If they decline "publicly to profess any statement of belief" they invite punishment for contempt. The privilege of choosing between speech that means ostracism and speech that means perjury is not freedom of speech. \* \* \*

It is said that Congress may punish propaganda that advocates overthrow of the government by force or violence; that it may therefore investigate to determine whether such legislation is necessary; and that it may do this even if the investigation burdens such propaganda and is intended to do so. In short, it is said that the House Committee's investigation is a necessary means to a constitutional end and is therefore constitutional. To this there are at least three answers.

(1) Investigation of possible need for legislation making it unlawful to advocate overthrow of the government by force or violence has not been necessary and has not been among the purposes of Congress or of the House Committee at any time since 1940. On the contrary, the broadest possible legislation of that sort was passed in that year and is still on the books.

(2) The Committee's enabling Act says nothing about force or violence or overthrow of the government. It is broad enough to include investigation of propaganda advocating such things, but it is not by any means limited to such propaganda, and neither is the Committee's actual investigation. Though the Committee has concerned itself largely with Communism, and formerly with fascism, it has also concerned itself with propaganda unrelated to any possible overthrow of the government by force and plainly beyond any power of Congress to burden or restrain. \* \* \*

(3) The problem is not, as the court suggests, that of balancing public or social interests against private interests. "The principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. \* \* \* Imprisonment of 'half-baked' agitators for 'foolish talk' may often discourage wise men from publishing valuable criticism of governmental policies. \* \* \* The great interest in free speech should be sacrificed only when the interest in public safety is really imperiled. \* \* \* The American policy is to meet force by force, and talk by talk." [Citing Chafee, *Free Speech in the United States*, 35, IX, 180.] \* \* \*

There is no evidence in the record that propaganda has created danger, clear and present or obscure and remote, that the government of the United States or any government in the United States will be overthrown by force or violence. \* \* \*

The court asks "How, except upon inquiry, would the Congress know whether the danger is clear and present?" The context shows that this means "How, except upon *Congressional* inquiry \* \* \*?"

The answer is: through the Department of Justice, whose duty it is, if clear and present danger can be discovered, to enforce the law of 1940 which makes it a crime to advocate overthrow of the government by force; through the intelligence services; and through any new agency that Congress may think it useful to create. As the House Committee's history shows, no dangerous propaganda that eludes other agencies is likely to be discovered by a congressional inquiry. But a congressional inquiry, however superfluous, to discover whether there is clear and present danger, could be authorized and could be conducted without violating the First Amendment. The premise that the government must have power to protect itself by discovering whether it is in clear and present danger of overthrow by violence is sound. But it does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world, on topics ranging from Communism, however remotely and peaceably achieved, to the "American system of checks and balances," the British Empire, and the Franco government of Spain. Since the premise does not support this conclusion it has nothing to do with this case. It justifies no punitive exposure. It justifies a very different investigation from the one the House Committee conducts. The investigation the Committee conducts is unsupported by any color of necessity. \* \* \*

The Committee's specific inquiry abridged appellants' freedom of speech and attempted to inflict punishment without trial. The Committee's entire investigation was unconstitutional both as abridging freedom of speech and as attempting to punish without trial; and there is no duty to respond to inquiries in an unconstitutional proceeding. The statute the appellants are convicted of violating provides no ascertainable standard of guilt. \* \* \*

#### NOTES

1. The Supreme Court denied certiorari in the Barsky case. 334 U. S. 843, 92 L. ed. 1767, 68 Sup. Ct. 1511 (1948), Justice Black and Douglas dissenting. Petition for rehearing was denied, the same justices dissenting, 339 U. S. 971, 94 L. ed. 1379, 70 Sup. Ct. 1001 (1950).

2. In *United States v. Josephson*, 165 F. (2d) 82 (1947), defendant, summoned by the same Committee, refused to take the oath and testify until he had had an opportunity in the courts to determine the legality of the Committee. Convicted of violating the statute, he appealed on the grounds (1) that if he had taken the oath and testified the Committee would have inquired into his "private affairs"; (2) that the investigation interfered with his freedom of speech; and (3) that since the Committee had recommended the enactment of but little legislation, the investigation was not in aid of the legislative function. The Court of Appeals for the Second Circuit repudiated all of these contentions and affirmed the conviction, Judge Clark dissenting. The Supreme Court denied certiorari, Justices Douglas, Murphy and Rutledge dissenting, 333 U. S. 838, 92 L. ed. 1122, 68 Sup. Ct. 609 (1948). Rehearing denied, 335 U. S. 899, 93 L. ed. 434, 69 Sup. Ct. 294 (1948).

3. In 1947 the investigation by the same Committee of alleged Communist infiltration of the motion picture industry led to the citation of ten witnesses for contempt in refusing to answer, among others, a question as to past and present membership of the witnesses in the Communist Party. Convictions of these witnesses were upheld by the Court of Appeals for the District of Columbia and all served prison sentences. *Lawson v. United States*, *Trumbo v. United States*, 176 F. (2d) 49, 85 App. D. C. 167 (1949). *Certiorari denied*, 339 U. S. 934, 972, 94 L. ed. 1352, 1379, 70 Sup. Ct. 663, 994 (1950), *Justices Black and Douglas dissenting*. *Rehearing denied*, 339 U. S. 972, 94 L. ed. 1379, 70 Sup. Ct. 994 (1950). For refusal to produce the books and records of the National Federation for Constitutional Liberties defendant Marshall was convicted of contempt and his conviction was upheld. *Marshall v. United States*, 176 F. (2d) 473, 85 App. D. C. 184 (1949). *Certiorari denied*, 339 U. S. 933, 94 L. ed. 1352, 70 Sup. Ct. 663 (1950), *Justice Black dissenting*. *Rehearing denied*, 339 U. S. 959, 94 L. ed. 1369, 70 Sup. Ct. 976 (1950). See also *Kamp v. United States*, 176 F. (2d) 618, 84 App. D. C. 187 (1948), *cert. den.*, 339 U. S. 957, 94 L. ed. 1369, 70 Sup. Ct. 977 (1950).

4. Rumely, secretary of the Committee for Constitutional Government, was convicted of contempt of the House Select Committee on Lobbying Activities for refusal to reveal the names of those who made bulk purchases of books for further distribution. The Court of Appeals for the District of Columbia reversed (Judge Bazelon dissenting) on the ground that the authority given the House Committee by the enabling resolution to investigate "all lobbying activities intended to influence, encourage, promote, or retard legislation" and "all activities of agencies of the federal government intended to influence, encourage, promote, or retard legislation" did not justify the demand made upon appellant, since the public sale of books and documents is not "lobbying." It was further held that the term "lobbying activities" must be interpreted in its commonly accepted sense and did not purport to confer power to investigate efforts to influence public opinion. *Rumely v. United States*, 197 F. (2d) 166, 90 App. D. C. 382 (1952). Granting *certiorari*, the Supreme Court affirmed on the ground that the resolution defining the Committee's powers had not conferred upon it authority to inquire into all efforts of private individuals to influence public opinion through books and periodicals. *United States v. Rumely*, 345 U. S. 41, 97 L. ed. 494, 73 Sup. Ct. 543 (1953). By thus limiting the scope of the Committee's powers the court avoided determination of the constitutional issue raised under the First Amendment. Speaking for the court Mr. Justice Frankfurter said: "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain. The loose language of *Kilbourn v. Thompson*, 103 U. S. 168, the weighty criticism to which it has been subjected, \* \* \* the inroads that have been made upon that case by later cases, *McGrain v. Daugherty*, 273 U. S. 135, 170-171, and *Sinclair v. United States*, 279 U. S. 263, strongly counsel abstention from adjudication unless no choice is left."

5. *Blau v. United States*, 340 U. S. 159, 95 L. ed. 170, 71 Sup. Ct. 223 (1950), although concerned specifically with the rights of a witness before a federal grand jury, indicates that a witness before a Congressional committee may rightfully refuse on the ground of compulsory self-incrimination to answer questions relative to past or present membership in the Communist Party. This constitutional right has been frequently claimed by witnesses summoned before such committees since the first indictment in 1948 of Communist Party leaders under the Smith Act. Prosecutions of a number of these witnesses ordered by the House were generally unsuccessful, the courts sustaining the privilege except in cases where it was held to have been waived or improperly invoked.

6. *United States v. Bryan*, 339 U. S. 323, 94 L. ed. 884, 70 Sup. Ct. 724 (1950) involved the refusal of the witness Bryan, executive secretary of the Joint Anti-Fascist Refugee Committee, to produce books, papers and records called for by subpoenas from the House Committee on Un-American Activities. The Supreme Court held, *inter alia*, that the statute (18 U. S. C. § 3486; F. C. A. 18 § 3486) which provides that no testimony given by a witness before a Congressional committee shall be used in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony, did not preclude the Government in the trial for contempt from reading to the jury testimony given by defendant before the Committee when called upon to produce the records. The court said, through Chief Justice Vinson: "Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the congressional purpose in its passage. We agree." Justices Black and Frankfurter, dissenting, thought that the court had read the statute as if Congress had forbidden the use of such testimony, "except in a prosecution for perjury or for failure to produce records." In their view, the effect of the statute was to render inadmissible defendant's testimony before the Committee.

7. The problem of balancing the power of Congress to investigate as an aid to the legislative process and the right of the individual witness to a fair hearing before a legislative committee has produced an enormous amount of discussion and a voluminous literature. Of especial value for its consideration of varying aspects of the problem is the Symposium on Congressional Investigations, 18 U. of Chi. L. Rev. 421 (1951). For an appraisal of the investigations conducted by the House Committee on Un-American Activities during its earlier years, see Ogden, *The Dies Committee* (2d ed., 1945). The most comprehensive and objective discussion of the work of this Committee during the period from 1945 to 1950 is to be found in Carr, *The House Committee on Un-American Activities* (1952). For an annotation on the privileges and immunities of witnesses testifying before Congressional committees, see 94 L. ed. 899 (1950). See also 19 A. L. R. (2d) 388 (1951).

### TENNEY v. BRANDHOVE.

Supreme Court of the United States, 1951.  
341 U. S. 367, 95 L. ed. 1019, 71 Sup. Ct. 783.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

William Brandhove brought this action in the United States District Court for the Northern District of California, alleging that he had been deprived of rights guaranteed by the Federal Constitution. The defendants are Jack B. Tenney and other members of a committee of the California Legislature, the Senate Fact-Finding Committee on Un-American Activities, colloquially known as the Tenney Committee. Also named as defendants are the Committee and Elmer E. Robinson, Mayor of San Francisco.

The action is based on §§ 43 and 47 (3) of title 8 of the United States Code. [F. C. A. 8 §§ 43, 47 (3).] These sections derive from one of the statutes, passed in 1871, aimed at enforcing the Fourteenth Amendment. Act of April 20, 1871, ch. 22, §§ 1, 2, 17 Stat. 13. Section 43 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." R. S. § 1979.

Section 47 (3) provides a civil remedy against "two or more persons" who may conspire to deprive another of constitutional rights, as therein defined.

Reduced to its legal essentials, the complaint shows these facts. The Tenney Committee was constituted by a resolution of the California Senate on June 20, 1947. On January 28, 1949, Brandhove circulated a petition among members of the State Legislature. He alleges that it was circulated in order to persuade the Legislature not to appropriate further funds for the Committee. The petition charged that the Committee had used Brandhove as a tool in order "to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end." In view of the conflict between this petition and evidence previously given by Brandhove, the Committee asked local prosecuting officials to institute criminal proceedings against him. The Committee also summoned Brandhove to appear before them at a hearing held on January 29. Testimony was there taken from the Mayor of San Francisco, allegedly a member of the conspiracy. The plaintiff appeared with counsel, but refused to give testimony. For this he was prosecuted for contempt in the State courts. Upon the jury's failure to return a verdict this prosecution was dropped. After Brandhove refused to testify, the Chairman quoted testimony given by Brandhove at prior hearings. The Chairman also read into the record a statement concerning an alleged criminal record of Brandhove, a newspaper article denying the truth of his charges, and a denial by the Committee's counsel—who was absent—that Brandhove's charges were true.

Brandhove alleges that the January 29 hearing "was not held for a legislative purpose," but was designed "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive plaintiff." Damages of \$10,000 were asked "for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense" in

the contempt proceeding arising out of the Committee hearings. The plaintiff also asked for punitive damages.

The action was dismissed without opinion by the District Judge. The Court of Appeals for the Ninth Circuit held, however, that the complaint stated a cause of action against the Committee and its members. 183 F. (2d) 121. We brought the case here because important issues are raised concerning the rights of individuals and the power of state legislatures. 340 U. S. 903.

We are again faced with the Reconstruction legislation which caused the Court such concern in *Screws v. United States* 325 U. S. 91, and in the *Williams Cases* decided this term. 341 U. S. 58, 341 U. S. 70. But this time we do not have to wrestle with far-reaching questions of constitutionality or even of construction. We think it is clear that the legislation on which this action is founded does not impose liability on the facts before us, once they are related to the presuppositions of our political history.

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, *Life of Sir Thomas More*, in *More's Utopia* (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament. Proceedings against Sir John Elliott (Eng) 3 How. St. Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary Sess. 2, cap. 2.

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article 5 of the Articles of Confederation is quite close to the English Bill of Rights: "Freedom of Speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. . . ." Article 1 § 6, of the Constitution provides: ". . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary,

that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Act (House of Commons, 1939) XIV.

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Constitution of 1776 provided: "That freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature." Part I, Art. 8. The Massachusetts Constitution of 1780 provided: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Part I, Art. 21. \* \* \*

The New Hampshire Constitution of 1784 provided: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever." Part I, Art. 30.

It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess. For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison, *The Federalist Papers*, No. XLVIII.

As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.

Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47 (3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advo-

cate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby v. White*, 2 Ld. Raym. 938, 2 Eng. Reprint 126, 1 E. R. C. 521, 3 id. 320, 2 Eng. Reprint 710. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn v. Thompson*, 103 U. S. 168; *Marshall v. Gordon*, 243 U. S. 521; compare *McGrain v. Daugherty*, 273 U. S. 135, 176.

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U. S. 423, 455.

Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation. Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern. The Committee was entitled to assert a right to call the plaintiff before it and examine him.

It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature

is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn v. Thompson*, 103 U. S. 168, *supra*, this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House.

We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the *Kilbourn Case*: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed. Reversed.

[MR. JUSTICE BLACK, concurring, said that the holding had resulted from "reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their legislative statements and activities." He pointed out, however, that the decision "indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act." MR. JUSTICE DOUGLAS, dissenting, emphasized that the claim was that a legislative committee brought the weight of its authority down on plaintiff for exercising his right of free speech. He thought that it was the purpose of the statute to secure federal rights against invasion by officers and agents of the states. "I see no reason," he said, "why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain."]

#### NOTES

1. Is the Court right in concluding that courts are not the proper place for the settlement of controversies of this type and that "self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses"? Legislative freedom has been so zealously guarded by constitutional provisions and by the courts that it will apparently take a strong case to break down the tradition of immunity.

2. Since constitutional problems relating to the delegation of legislative power and the limits of discretion in rule-making are dealt with in separate courses in Administrative Law, now offered in the curricula of most law schools, these topics are omitted from consideration in this case-book. On the general subject, see Duff and Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 *Corn. L. Q.* 168 (1929), 4 *Selected Essays on Constitutional Law* (1938), 291; Weeks, *Legislative Power Versus Delegated Legislative Power*, 25 *Geo. L. J.* 314 (1937), 4 *Selected Essays on Constitutional Law* (1938), 228; Cheadle, *The Delegation of Legislative Functions*, 27 *Yale L. J.* 892 (1918), 4 *Selected Essays on Constitutional Law* (1938), 250; Nutting, *Congressional Delegations since the Schechter Case*, 14 *Miss. L. J.* 350 (1942); Jaffe, *An Essay on Delegation of Legislative Power*, 47 *Col. L. Rev.* 359, 561 (1947); Comment, *Delegation of Legislative Power*, 24 *Cal. L. Rev.* 184 (1936).

## CHAPTER III

### INTERGOVERNMENTAL RELATIONS

#### Section 1.—The States and the United States.

##### COYLE v. SMITH.

Supreme Court of the United States, 1911.  
221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. 688.

[An Act of Congress of June 16, 1903, entitled, "An act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states" required that the capital of said State of Oklahoma should be temporarily located at Guthrie and should not be moved prior to 1913, and that in the interval the state should not appropriate any public money to erect buildings for capital purposes. The act also required that a constitutional convention held in the state should "by ordinance irrevocable, accept the terms and conditions of the act." A convention did so. In 1910 the legislature of the state passed a statute removing the capital from Guthrie to Oklahoma City and made appropriation for the erection of capital buildings. Another statute gave the Supreme Court of Oklahoma original jurisdiction of a taxpayer's bill to test the validity of the capital-removal statute. To review the judgment of that court sustaining the statute this writ of error was sued out.]

MR. JUSTICE LURTON delivered the opinion of the Court. \* \* \*

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a state be placed upon a plane of inequality with its sister states in the union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this union, and the constitutional duty of guaranteeing to "every state in the union a republican form of government." The position of counsel

for the appellants is substantially this: That the power of Congress to admit new states and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states." \* \* \*

The power is to admit "new States into *this* Union."

"This Union" was and is a union of states, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. \* \* \*

We come now to the question as to whether there is anything in the decisions of this Court which sanctions the claims that Congress may by the imposition of conditions in an enabling act deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question, we must distinguish first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers

of such new states in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new state at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state constitution, and not that of an act of Congress. \* \* \*

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she by virtue of her jurisdictional sovereignty as such a state may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. \* \* \*

The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

MR. JUSTICE MCKENNA AND MR. JUSTICE HOLMES dissent.

## NOTES

1. "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States.

"Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the states. But in many articles of the Constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the *Federalist*, thus: 'The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.'" Mr. Chief Justice Chase in *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. ed. 101, 104 (1868).

2. The Supreme Court had distinguished between conditions imposed upon incoming states which impinge upon their political or governmental authority and those which relate to contractual arrangements affecting property rights and

relationships. In *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. 73 (1900), it was held that an agreement in the enabling act of Minnesota by which the state received from the United States certain public lands in return for which it agreed not to tax the land still owned in the state by the federal government and not to tax the property of nonresidents at a higher rate than that of residents, was enforceable against a subsequent effort of the state to violate it. The court said: "There may be agreements or compacts attempted to be entered into between two states, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation."

3. In *Economy Light & Power Co. v. United States*, 256 U. S. 113, 65 L. ed. 847, 41 Sup. Ct. 409 (1921), it was said that restrictions on the action of a state imposed by Congress prior to its admission on a subject within the jurisdiction of Congress are valid, for they may be imposed after, as well as before, the admission of the state into the Union. Here the court held that insofar as the Ordinance of 1787 for the government of the Northwest Territory (re-enacted by Congress in 1789) established rights of highway in navigable waters capable of bearing interstate commerce, it did not regulate internal affairs of states and was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by Congress. But the court said: "To the extent that it pertained to internal affairs, the Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the State of Illinois into the Union 'on an equal footing with the original states in all respects whatever'."

4. In *Ervin v. United States*, 251 U. S. 41, 64 L. ed. 128, 40 Sup. Ct. 75 (1919) it was held that an injunction might issue against the expenditure by New Mexico of money drawn from the sale of public lands granted by Congress to the State upon its admission into the Union, when such expenditure was for a purpose other than that specified in the enabling act. This action by the State was held to constitute a breach of trust and the principle of the equality of states was not involved.

5. *United States v. Texas*, 339 U. S. 707, 94 L. ed. 1221, 70 Sup. Ct. 918 (1950) is a recent decision applying the principle of the equality of states. Here the "equal footing" clause of the resolution annexing Texas was held to dispose of the controversy between Texas and the United States as to dominion over oil and other mineral resources under the bed of the ocean below low-water mark off the shores of Texas. The court upheld the claims of the United States, notwithstanding statutes enacted by Texas extending its boundary to a line in the Gulf of Mexico 24 marine miles beyond the three-mile limit and thereafter to the outer edge of the continental shelf. Speaking for the court, Mr. Justice Douglas said: "Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States \* \* \*. The 'equal footing' clause prevents extension of the sovereignty of a state into a domain of political and sovereign power of the United States from which the other states have been excluded, just as it prevents a contraction of sovereignty. \* \* \*

which would produce inequality among the states. For equality of states means that they are not 'less or greater, or different in dignity or power.'" Justices Jackson and Clark did not participate and Justices Reed and Minton dissented. Justice Frankfurter did not expressly dissent but indicated disapproval.

### EL PASO & NORTHEASTERN R. CO. v. GUTIERREZ.

Supreme Court of the United States, 1909.

215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. 21.

[Action for damages for death of plaintiff's intestate alleged to have been caused by the wrongful act of the defendant railway company while the intestate was engaged in its service in the Territory of New Mexico. The issue below was whether the plaintiff's rights were governed by a statute of the Territory or by an Act of Congress, the so-called Employers' Liability Act of June 11, 1906, c. 3073, 34 Stat. 232. The defendant's chief contention was that the Employers' Liability Act was unconstitutional. It relied upon the Employers' Liability Cases, 207 U. S. 463 (1908) where the Supreme Court had so held. The case was tried under the latter statute with verdict and judgment for the plaintiff. After intermediate appeals a writ of error was prosecuted to the Supreme Court.]

MR. JUSTICE DAY delivered the opinion of the Court. \* \* \*

In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject.

Is the Federal Employers' Liability Act of June 11, 1906, unconstitutional so far as it relates to common carriers engaged in trade or commerce in the Territories of the United States? It has been suggested that this question is foreclosed by a decision of this court in the Employers' Liability Cases, 207 U. S. 463. In that case this court held that, conceding the power of Congress to regulate the relations of employer and employe engaged in interstate commerce, the act of June 11, 1906, c. 3073, 34 Stat. 232, was unconstitutional in this, that in its provisions regulating interstate commerce Congress exceeded its constitutional authority in undertaking to make employers responsible, not only to employes when engaged in interstate commerce, but to any of its employes, whether engaged in interstate commerce or in commerce wholly within a State. That the unconstitutionality of the act, so far as it relates to the District of Columbia and the Territories, was not determined is evident from a consideration of the opinion of the court in the case. In answering the suggestion that the words "any employe" in the statute should be so read as to mean only employes engaged in

interstate commerce, Mr. Justice White, delivering the opinion of the Court, said:

"But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States.' It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employes, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employe when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy." 207 U. S. 500.

A perusal of this portion of the opinion makes it evident that it was not intended to hold the act unconstitutional in so far as it related to the District of Columbia and the Territories, for it is there suggested that to interpolate in the act the qualifying words contended for would destroy the act in respect to the District of Columbia and the Territories by limiting its operation in a field where Congress had plenary power, and did not depend for its authority upon the interstate commerce clause of the Constitution. The act in question is set forth in full in a note to Employers' Liability Cases, 207 U. S. 463, 490. We are concerned in the present case with its first section only. \* \* \*

A perusal of this section makes it evident that Congress is here dealing, first, with trade or commerce in the District of Columbia and the Territories; and, second, with interstate commerce, commerce with foreign nations, and between the Territories and the States. As we have already indicated, its power to deal with trade or commerce in the District of Columbia and the Territories does not depend upon the authority of the interstate commerce clause of the Constitution. Upon

the other hand, the regulation sought to be enacted as to commerce between the States and with foreign nations depends upon the authority of Congress granted to it by the Constitution to regulate commerce among the States and with foreign nations. As to the latter class, Congress was dealing with a liability ordinarily governed by state statutes, or controlled by the common law as administered in the several states. The federal power of regulation [of commerce] within the states is limited to the right of Congress to control transactions of interstate commerce; it has no authority to regulate commerce wholly of a domestic character. It was because Congress had exceeded its authority in attempting to regulate the second class of commerce named in the statute that this court was constrained to hold the act unconstitutional. The act undertook to fix the liability as to "any employe," whether engaged in interstate commerce or not, and, in the terms of the act, had so interwoven and blended the regulation of liability within the authority of Congress with that which was not that the whole act was held invalid in this respect. \* \* \*

Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the Territories. \* \* \*

[The judgment for the plaintiff was affirmed.]

#### NOTES

1. The Constitution (Art. IV, § 3, cl. 2) vests in Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The power of Congress "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia is also provided for in the Constitution (Art. I, § 8, cl. 17).

2. To meet the defect in the Employers' Liability Act of 1906 pointed out in the first Employers' Liability Cases, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141 (1908), Congress enacted a second Employers' Liability Act in 1908. In respect to employers engaged in interstate commerce the second statute was restricted to apply to the legal relations between such employers and such of their employees as were at the time of injury themselves engaged in interstate commerce. This statute was held valid in the Second Employers' Liability Cases, 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. 169 (1912).

3. In *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 231, 10 Sup. Ct. 19 (1889) it was held that the District of Columbia is a municipal corporation and as such is not exempt from the operation of statutes of limitation, which run in favor of and against such corporations.

4. The power of Congress to open federal courts in the several states to an action by a citizen of the District of Columbia against a citizen of one of the states was upheld in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582, 93 L. ed. 1556, 69 Sup. Ct. 1173 (1949). The plaintiff, a corpora-

tion created by District of Columbia law, commenced in the United States District Court for Maryland an action against a corporation chartered by Virginia, and amenable to suit in Maryland by virtue of a license to do business there. Jurisdiction was predicated solely upon an allegation of diverse citizenship, the plaintiff relying upon a statute enacted by Congress in 1940 which extended the diversity jurisdiction of the district courts to citizens of the District of Columbia. The Court of Appeals for the Fourth Circuit held the statute invalid because Congress had no power to enact it either under the clause of the Constitution (Art. I, § 8, cl. 17) which authorizes Congress to exercise exclusive legislation in the District of Columbia or under the provision (Art. III, § 2) which defines the judicial power of the United States as extending to controversies "between citizens of different states," which latter clause does not embrace citizens of the District of Columbia. Different majorities of the Supreme Court agreed with the lower court as regards both of these propositions—six of the members (all except Justices Jackson, Black and Burton) with the first, and seven (all except Justices Rutledge and Murphy) with the second. Nevertheless, a majority of the court sustained the statute. Justices Jackson, Black and Burton took the view that Congress may exert its power over the District of Columbia under Article I by imposing the judicial function of adjudicating justiciable controversies on the regular federal courts. Justices Rutledge and Murphy thought that the District was a state under Article III, and consequently that Congress had the power to enact the statute under this article. Justices Frankfurter and Reed joined in one dissenting opinion and Chief Justice Vinson and Justice Douglas joined in another dissenting opinion.

5. The power of the United States to acquire and govern territory and the extent to which the provisions of the Constitution apply to such territory have been dealt with in a series of decisions sometimes called "the insular cases." In *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. 743 (1901) the court held that while Porto Rico did not become a part of the United States by virtue of its annexation it did cease to be foreign territory, and therefore tariff duties could not be collected upon goods imported therefrom. Congress thereupon altered the tariff laws so as to retain certain duties upon goods brought in from Porto Rico and the Philippines. In *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. 770 (1901) the court assumed that the levy of these duties violated the limitation imposed by the Constitution on the power of Congress to tax, namely, that "all duties, imposts, and excises shall be uniform throughout the United States," if this limitation was applicable, but held that it was not applicable to Congress in legislating with respect to Porto Rico. An anomalous concept called "unincorporated territory" was evolved. While Porto Rico was no longer foreign territory and was fully subject to legislative control by Congress, it was nevertheless not entitled to equality of treatment under the tariff laws until Congress chose to extend such treatment. In other words, territories may be annexed but not "incorporated." Before annexed territory, such as Porto Rico, is deemed a part of the United States within which the entire Constitution operates of its own force, it must first become "incorporated" into the United States by the express or implied consent of Congress. No such intent had been evidenced here.

The court has further taken the view that only those guaranties of civil liberty embraced in the Bill of Rights which are deemed to be fundamental or basic in character operate of their own force within an unincorporated territory. These restrictions must be observed by Congress in the governance of any territory, incorporated or unincorporated. Other guaranties, however, deemed to be more formal or procedural in nature, Congress need not make applicable to an unincorporated territory unless it sees fit to do so. The only guaranties which the court has held to fall within this latter category are the requirements of indictment by grand jury and trial by jury in criminal cases as provided for in the

Fifth and Sixth Amendments. See *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. 787 (1903); *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. 808 (1904); *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. 514 (1905); *Balzac v. Porto Rico*, 258 U. S. 298, 66 L. ed. 627, 42 Sup. Ct. 343 (1922).

### TARBLE'S CASE.

Supreme Court of the United States, 1871.

13 Wall. 397, 20 L. ed. 597.

Error to the Supreme Court of Wisconsin.

This was a proceeding on habeas corpus for the discharge of one Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that state to issue the writ of habeas corpus upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. \* \* \*

The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

Afterwards, in September of the same year, that officer applied to the supreme court of the state for a certiorari, setting forth in his application the proceedings before the commissioner and his ruling thereon. \* \* \*

Upon these proceedings the case was duly argued before the supreme court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner discharging the prisoner. This judgment was now before this court for examination on writ of error prosecuted by the United States. \* \* \*

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the Court. \* \* \*

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement.

Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the states against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state, or from state authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Now, among the powers assigned to the national government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service

to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. \* \* \* It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the national legislature.

State judges and state courts, authorized by laws of their states to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the state; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

This right to inquire by process of habeas corpus, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its

sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." \* \* \*

Judgment reversed.

# NOTE

1. The quotations from Mr. Chief Justice Taney in the court's opinion in the reported case are from his opinion in *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169 (1859), one of the famous cases in American constitutional history during the period preceding the Civil War. Booth, an abolitionist editor who had assisted a fugitive slave to escape, was held in custody by Ableman, United States marshal, pending trial for violation of the act of Congress known as the fugitive slave law. The Supreme Court of Wisconsin, on a writ of habeas corpus, discharged him from custody. Later he was tried before the federal district court, convicted and sentenced to imprisonment and fine. The Supreme Court of Wisconsin again ordered his release, holding that the fugitive slave law was unconstitutional. The case was brought to the Supreme Court of the United States on writ of error, where the judgment was reversed. The historical setting of the case is sketched in 2 Warren, *The Supreme Court in United States History* (1923), 532-540. See also, Swisher, *American Constitutional Development* (1943), 251-254.

# TESTA v. KATT.

Supreme Court of the United States, 1947.

330 U. S. 386, 91 L. ed. 967, 67 Sup. Ct. 810, 172 A. L. R. 225.

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 205(e) of the Emergency Price Control Act provides that a buyer of goods above the prescribed ceiling price may sue the seller "in any court of competent jurisdiction" for not more than three times the amount of the overcharge plus costs and a reasonable attorney's fee. Section 205(c) provides that federal district courts shall have jurisdiction of such suits "concurrently with State and Territorial courts." Such a suit under § 205(e) must be brought "in the district or county in which the defendant resides or has a place of business \* \* \*."

The respondent was in the automobile business in Providence, Providence County, Rhode Island. In 1944 he sold an automobile to petitioner Testa, who also resides in Providence, for \$1100, \$210 above the ceiling price. The petitioner later filed this suit against respondent in the State District Court in Providence. Recovery was sought under § 205(e). The court awarded a judgment of treble damages and costs to petitioner. On appeal to the State Superior Court, where the trial was *de novo*, the petitioner was again awarded judgment, but only for the amount of the overcharge plus attorney's fees. Pending appeal from this judgment, the Price Administrator was allowed to intervene. On appeal, the State Supreme Court reversed, 71 R. I. 472, 47 A. 2d 312. It interpreted § 205(e) to be "a penal statute in the international sense." It held that an action for violation of § 205(e) could not be maintained in the courts of that State. The State Supreme Court rested its holding on its earlier decision in *Robinson v. Norato*, 1945, 71 R. I. 256, 43 A. 2d 467, 468, in which it had reasoned that: A state need not enforce the penal laws of a government which is "foreign in the international sense"; § 205(e) is treated by Rhode Island as penal in that sense; the United States is "foreign" to the State in the "private international" as distinguished from the "public international" sense; hence Rhode Island courts, though their jurisdiction is adequate to enforce similar Rhode Island "penal" statutes, need not enforce § 205(e). Whether state courts may decline to enforce federal laws on these grounds is a question of great importance. For this reason, and because the Rhode Island Supreme Court's holding was alleged to conflict with this Court's previous holding in *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, we granted certiorari.

For the purposes of this case, we assume, without deciding, that § 205(e) is a penal statute in the "public international," "private international," or any other sense. So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI, § 2 of the Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws. Such an assumption represents an erroneous evaluation of the statutes of Congress and the prior decisions of this Court in their historic setting. Those decisions establish that state courts do not bear the same relation to the United States that they do to foreign countries. The first Congress that convened after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws, and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.

Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claffin v. Houseman*, 93 U. S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, "anything in the Constitution or Laws of any State to the contrary notwithstanding." It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. And the Court stated that "If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court." *Id.* 93 U. S. at page 137. And see *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 479.

The Clafin opinion thus answered most of the arguments theretofore advanced against the power and duty of state courts to enforce federal penal laws. And since that decision, the remaining areas of doubt have been steadily narrowed. There have been statements in cases concerned with the obligation of states to give full faith and credit to the proceedings of sister states which suggested a theory contrary to that pronounced in the Clafin opinion. But when in *Mondou v. New York, N. H. & H. R. Co.*, supra, this Court was presented with a case testing the power and duty of states to enforce federal laws, it found the solution in the broad principles announced in the Clafin opinion. \* \* \*

So here, the fact that Rhode Island has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a "valid excuse." Cf. *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377, 388. For the policy of the federal Act is the prevailing policy in every state. \* \* \*

The Rhode Island court in its Robinson decision on which it relies cites cases of this Court which have held that states are not required by the full faith and credit clause of the Constitution to enforce judgments of the courts of other states based on claims arising out of penal statutes. But those holdings have no relevance here, for this case raises no full faith and credit question. Nor need we consider in this case prior decisions to the effect that federal courts are not required to enforce state penal laws. Compare *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, with *Massachusetts v. Missouri*, 308 U. S. 1, 20. For whatever consideration they may be entitled in the field in which they are relevant, those decisions did not bring before us our instant problem of the effect of the supremacy clause on the relation of federal laws to state courts. Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law.

It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.* [F. C. A. 29 § 201 *et seq.*]. Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim. See *McKnett v. St. Louis & S. F. R. Co.*, 292 U. S. 230, and compare *Herb v. Pitcairn*, 324 U. S. 117; *Id.*, 325 U. S. 77. The case is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

## NOTES

1. In "assuming" that the statute involved was penal in the "public international," "private international," or any other sense, did not the court go further than was necessary in order to impose an obligation on the Rhode Island tribunal to entertain this suit? Could not the provision of the Emergency Price Control Act have been considered remedial in that it gave to a party aggrieved by its violation a right of recovery to the extent of three times the amount of the overcharge?

2. The view that state courts could refuse to assume jurisdiction to enforce laws of Congress which they considered penal in nature was asserted in earlier state court decisions and supported by dicta in *Huntington v. Attrill*, 146 U. S. 657, 672, 36 L. ed. 1123, 1129, 13 Sup. Ct. 224, 229 (1892). See Note, 21 So. Cal. L. Rev. 392 (1948).

## KOHL v. UNITED STATES.

Supreme Court of the United States, 1875.

91 U. S. 367, 23 L. ed. 449.

Error to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post-office and other public uses.

The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated. They moved to dismiss the proceeding on the ground of want of jurisdiction; which motion was overruled. \* \* \* Judgment was rendered in favor of the United States. \* \* \*

MR. JUSTICE STRONG delivered the opinion of the Court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or

even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. \* \* \*

But, if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman v. Booth*, 21 How. 506, 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? \* \* \*

It is true, this power of the federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. \* \* \* The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only,

if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired. \* \* \*

But it is contended on behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. \* \* \*

The judgment of the Circuit Court is

Affirmed.

[Mr. JUSTICE FIELD dissented.]

#### NOTE

1. Mr. Justice Field's dissent in the instant case expressed the view that federal courts have no *inherent* power to entertain a suit of this character. He said: "It appears to me that provision for the exercise of the right must first be made by legislation. The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of Congress conferring upon them such authority." Before the Civil War it was generally denied that the government of the United States could exercise the power of eminent domain within a state without the consent of the state. See Corwin, *National Supremacy—Treaty Power v. State Power* (1913), 262-263.

#### UNITED STATES v. ARJONA.

Supreme Court of United States, 1887.

120 U. S. 479, 30 L. ed. 728, 7 Sup. Ct. 628.

Indictment under the Act of May 16, 1884, 23 Stat. 22, to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments. The court below certified a division in opinion on several points.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

\* \* \*

Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, Art. I, Sec. 8, Cl. 18; and the government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can "regulate commerce with foreign nations," Art. I, Sec. 8, Cl. 3; make treaties and appoint ambassadors and other public ministers and consuls. Art. II, Sec. 2, Cl. 2. A state is expressly prohibited from entering into any "treaty, alliance, or confederation." Art. I, Sec. 10, Cl. 1. Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized "to define and punish \* \* \* offenses against the law of nations." Art. I, Sec. 8, Cl. 10.

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized. Vattel, in his *Law of Nations*, which was first printed at Neuchatel in 1758, and was translated into English and published in England in 1760, uses this language: "From the principles thus laid down, it is easy to conclude, that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury." When this was written money was the chief thing of this kind that needed protection, but still it was added: "There is another custom more modern, and of no less use to commerce than the establishment of coin, namely, *exchange*, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, at very trifling expense, and, if he pleases, without risk. For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom, by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and duty of every nation to have wise and equitable commercial laws established in the country." Vattel, *Law of Nations*, Phil. ed. 1876, Book I, chap. 10, pages 46, 47. \* \* \*

In the time of Vattel certificates of the public debt of a nation, government bonds, and other government securities, were rarely seen in any other country than that in which they were put out. Banks of issue were not so common as to need special protection for them-

selves or the public against forgers and counterfeiters elsewhere than at home, and the great corporations, now so numerous and so important, established by public authority for the promotion of public enterprises, were almost unknown, and certainly they had not got to be extensive borrowers of money whenever it could be had at home or abroad on the faith of their quasi public securities. Now, however, the amount of national and corporate debt and of corporate property represented by bonds, certificates, notes, bills, and other forms of commercial securities, which are bought and sold in all the money markets of the world, both in and out of the country under whose authority they were created, is something enormous. \* \* \*

No nation can be more interested in this question than the United States. Their money is practically composed of treasury notes or certificates issued by themselves, or of bank bills issued by banks created under their authority and subject to their control. Their own securities, and those of the states, the cities, and the public corporations, whose interests abroad they alone have the power to guard against foreign national neglect, are found on sale in the principal money markets of Europe. If these securities, whether national, municipal, or corporate, are forged and counterfeited with impunity at the places where they are sold, it is easy to see that a great wrong will be done to the United States and their people. Any uncertainty about the genuineness of the security necessarily depreciates its value as a merchantable commodity, and against this international comity requires that national protection shall, as far as possible, be afforded. If there is neglect in that, the United States may, with propriety, call on the proper government to provide for the punishment of such an offense, and thus secure the restraining influences of a fear of the consequences of wrong doing. \* \* \*

But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment

of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States. \* \* \* [It was further held that it was unnecessary for Congress to declare an act to be an offense against the law of nations, if it was in fact of this character.]

### KANSAS v. COLORADO.

Supreme Court of the United States, 1907.  
206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655.

[The State of Kansas brought this original suit in the Supreme Court to restrain the State of Colorado and certain corporations organized under the latter's laws from diverting the water of the Arkansas River for irrigation of lands in Colorado thereby, as alleged, preventing the natural and customary flow of the river into and through Kansas. The United States filed an intervention petition claiming a right to control the water of the river to aid in the reclamation of arid lands.]

MR. JUSTICE BREWER delivered the opinion of the Court. \* \* \*

The primary question is, of course, of national control. For, if the nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two states in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. \* \* \*

It follows from this that if in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of

all these arid lands and for that purpose to appropriate the accessible waters. \* \* \*

In other words, the determination of the rights of the two states inter sese in regard to the flow of waters in the Arkansas River is subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this Court from the beginning is that this government is one of enumerated powers. "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326. "The Government of the United States is one of delegated, limited, and enumerated powers." *United States v. Harris*, 106 U. S. 629, 635.

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. \* \* \*

We must look beyond section 8 for Congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of Article IV, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the states of the union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the

internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things.

This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one state, but the people of all the states, and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. \* \* \*

[Upon extended consideration of the evidence the Court concluded that Kansas had not established sufficient present injury from the acts of Colorado to entitle her to equitable relief.]

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river. Each party will pay its own costs. \* \* \*

MR. JUSTICE WHITE and MR. JUSTICE McKENNA concur in the result. MR. JUSTICE MOODY took no part in the decision of this case.

#### NOTES

1. The doctrine of "inherent federal power," repudiated in *Kansas v. Colorado*, has been ascribed to James Wilson, a delegate to the Constitutional Convention of 1787 and later a justice of the Supreme Court of the United States. See 1 Willoughby, *The Constitutional Law of the United States* (2d ed., 1929), 80-83. It achieved prominence during the presidency of Theodore Roosevelt, who warmly espoused it as supplying a philosophical basis for his "New Nationalism." The doctrine has received judicial approval as regards the powers of the national government to wage war and conduct its foreign relations, which have been said to exist, independently of the Constitution, as an inherent attribute of national sovereignty. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. 1016 (1893); *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304, 81 L. ed. 255, 57 Sup. Ct. 216 (1936).

2. Besides its significance as a decision marking the limits of national power, the principal case illustrates how controversies between states of a justiciable nature may be settled peacefully in the judicial forum. As a substitute for force in the settlement of such controversies, the Constitution (Art. III, § 2, cl. 1) extends the judicial power of the United States to "controversies between two or more states." Cases of such a character are included within the original jurisdiction of the Supreme Court. Viewed from this aspect, the case might well be included in Section 4 of this chapter.

3. In a recently published historical study the challenging and unorthodox thesis is presented that the framers of the Constitution intended to, and did, give Congress "a general national legislative power," unrestrained by any division of authority between federal and state governments, and that within this national government of plenary powers the intention was to make Congress supreme. Crosskey, *Politics and the Constitution in the History of the United States* (2 vols. 1953). This work is subjected to critical examination and analysis in the symposium reviews in 54 Col. L. Rev. 439 (1954); 41 Cal. L. Rev. 209 (1953), and 49 Northwestern U. L. Rev. 107 (1954).

4. For recent discussions of various aspects of American Federalism, see Hart, *The Relations Between State and Federal Law*, 54 Col. L. Rev. 489 (1954); Wechsler, *The Political Safeguards of Federalism: The Role of the States in*

the Composition and Selection of the National Government, 54 Col. L. Rev. 543 (1954); and Freund, *Umpiring the Federal System*, 54 Col. L. Rev. 561 (1954).

## Section 2.—Some Problems of Sole and Dual Government.

### JOHNSON v. MARYLAND.

Supreme Court of the United States, 1920.  
254 U. S. 51, 65 L. ed. 126, 41 Sup. Ct. 16.

This was a prosecution based on § 143 of Art. 56 of the Code of Public General Laws of Maryland, as amended by c. 85, Acts of 1918. The opinion states the case.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The plaintiff in error was an employee of the Post Office Department of the United States and while driving a government motor truck in the transportation of mail over a post road from Mt. Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted and fined for so driving without having obtained a license from the state. He saved his constitutional rights by motion to quash, by special pleas which were overruled upon demurrer and by motion in arrest of judgment. The facts were admitted and the naked question is whether the state has power to require such an employee to obtain a license by submitting to an examination concerning his competence and paying three dollars, before performing his official duty in obedience to superior command.

The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and indiscriminating, the state's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the states to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. *Farmers & Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 525, 526. A little later the scope of the proposition as then understood was indicated in *Osborn v. Bank of the United States*, 9 Wheat. 738, 867. "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at

which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by federal authority." *Ohio v. Thomas*, 173 U. S. 276, 283. It seems to us that the foregoing decisions establish the law governing this case.

Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States v. Hart*, Pet. C. C. 390. 5 Ops. Atty. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might effect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. *Commonwealth v. Closson*, 229 Massachusetts, 329. This might stand on much the same footing as liability under the common law of a state to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States. *In re Neagle*, 135 U. S. 1.

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. *Keim v. United States*, 177 U. S. 290, 293.

Judgment reversed.

MR. JUSTICE PITNEY and MR. JUSTICE McREYNOLDS dissent.

#### NOTES

1. "The most important agents of the federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the state. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government

are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death." *Mr. Justice Miller in First National Bank v. Kentucky*, 9 Wall. 353, 361-362, 19 L. ed. 701 (1870).

2. A statute of Florida which required inspection and a label on each bag indicating payment of the inspection fee, was held invalid as applied to fertilizers used by the United States in its soil conservation program in *Mayo v. United States*, 319 U. S. 441, 87 L. ed. 1504, 63 Sup. Ct. 1137, 147 A. L. R. 761 (1943).

### ANDERSON NATIONAL BANK v. LUCKETT.

Supreme Court of the United States, 1943.

321 U. S. 233, 88 L. ed. 692, 64 Sup. Ct. 599, 151 A. L. R. 824.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

Under Kentucky Revised Statutes of 1942, c. 393, §§ 393.060 et seq., every bank or trust company in the state is required to turn over to the state, deposits which have remained inactive and unclaimed for specified periods. \* \* \*

The statute thus sets up a comprehensive scheme for the administration of abandoned bank deposits. Upon a report by the bank and notice to the depositors and with an opportunity to be heard, if either wish it, the state takes into its protective custody bank accounts which, having been inactive for at least ten years if demand accounts, or at least twenty-five years if non-demand, the statute declares to be presumptively abandoned. The bank is relieved of its liability to the depositors, who receive instead a claim against the state, enforceable at any time until the deposits are judicially found to be abandoned in fact and for five years thereafter. Refusal by the designated state officer to make payment is reviewable by the state courts. \* \* \*

[The plaintiff national bank sued for an injunction in a Kentucky court. On appeal therefrom the Kentucky Court of Appeals sustained the statute in its entirety and this appeal was taken.]

Appellant contends here: (1) that the statute, in requiring payment of the deposit accounts to the state on the prescribed notice, without recourse to judicial proceedings or any court order or judgment, deprives the depositors and appellant of property without due process of law, and (2) that such withdrawal of accounts from a national bank infringes the national banking laws, particularly R. S. § 5136, 12 U. S. C. § 24, which authorize national banks to accept

deposits and to do a banking business, and is an unconstitutional interference with the federally authorized function of national banks as instrumentalities of the Federal Government. \* \* \*

[On the first point the Court held that the procedural provisions of the statute meet all constitutional requirements and that it does not deprive the bank or its depositors of property without due process of law.]

We come now to appellant's second contention, that the Kentucky statute infringes the national banking laws and unconstitutionally interferes with appellant as an instrumentality of the federal government. But the statute does not discriminate against national banks, *cf. McCulloch v. Maryland*, 4 Wheat. 316, by directing payment to the state by state and national banks alike, of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes. *Cf. Davis v. Elmira Savings Bank*, 161 U. S. 275.

This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions.  
\* \* \*

As we have seen, a bank account is a chose in action of the depositor against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is a part of the mass of property within the state whose transfer and devolution is subject to state control.  
\* \* \* It has never been suggested that non-discriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks.

The statute here attacked does not purport to do more than does any other regulation of the devolution of bank accounts of missing persons, a function which is, as we have seen, within the competence of the state. Under the statute the state merely acquires the right to demand payment of the accounts in the place of the depositors. Upon payment of the deposits to the state, the bank's obligation is discharged. Something more than this is required to render the statute obnoxious to the federal banking laws. For an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business. A demand for payment of an account by one entitled to make the demand does not infringe or interfere with any authorized function of the bank. In fact, inability to comply with such demands is made a basis in the national banking laws for closing the doors of the bank and winding up its affairs.

Appellant argues that if the present act is sustained, it will open the door to the exertion of unlimited state discretionary power over the deposits in national banks, and that the act imposes a burden on appellants such as was held to be inadmissible in *First National Bank v.*

California, 262 U. S. 366, which was followed in *National City Bank v. Philippine Islands*, 302 U. S. 651. As we have seen, the only power sought to be exerted by the state over the depositors' accounts is the assertion of its lawfully acquired right to collect them, in accordance with the obligation, which was both assumed by appellant and is to be performed in conformity with the banking laws of the United States. In this respect the state's power to make such a demand cannot extend beyond its power under state law and the Federal Constitution to acquire control of deposit accounts from their owners. So long as it is thus limited, and the power is exercised only to demand payment of the accounts in the same way and to the same extent that the depositors could, we can perceive no danger of unlimited control by the state over the operations of national banking institutions. \* \* \*

The decision of this Court in *First National Bank v. California*, supra, did not rest on any want of power of a state to demand of a national bank, payment of deposits which the state was lawfully entitled to receive. Decision there turned rather on the effect of the state statute in altering the contracts of deposit in a manner considered so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks. \* \* \*

The unusual alteration of depositors' accounts to which the Court referred was plainly the statutory declaration of escheat of depositors' accounts merely because of their dormancy for the specified period, without any determination of abandonment in fact. This it treated as in effect "confiscation" of depositors' accounts, operating as an effective deterrent to depositors' placing their funds in national banks doing business within the state.

We have no occasion to reconsider this decision, as appellees urge, for the grounds assigned for it are wholly wanting here. While the seizure and escheat or forfeiture for mere dormancy of a national bank account are unusual, the escheat or appropriation by the state of property in fact abandoned or without an owner is, as we have seen, as old as the common law itself. Here there is no escheat or forfeiture by reason of dormancy. Dormancy without more is made the statutory ground for the state's taking inactive bank accounts into its custody, the state assuming the bank's obligation to the depositors. And the deposits need not be surrendered, if the depositors or the bank make it appear that abandonment has not occurred. This is not confiscation or even an attempted deprivation of property. Escheat or forfeiture to the state may follow, but only on proof of abandonment in fact. We cannot say that the protective custody of long inactive bank accounts, for which the Kentucky statute provides, and which in many circumstances may operate for the benefit and security of depositors, \* \* \* will deter them from placing their funds in national banks in that state. It cannot be said that it would have that effect, more than would the tax laws, the attachment laws, or the

laws for the administration of estates of decedents or of missing or unknown persons, which a state may maintain and apply to depositors in national banks. \* \* \*

Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs. \* \* \* Affirmed.

### McCULLOCH v. MARYLAND.

Supreme Court of the United States, 1819.

4 Wheat. 316, 425, 4 L. ed. 579.

[For other facts and the first part of the opinion see post, p. 355. The Maryland statute forbade any bank or branch in the state, not chartered by the state, to issue notes except upon stamped paper to be bought from the state at rates varying from 1 to 2% of the face value of the notes, provided that such bank or branch could relieve itself of this requirement by paying \$15,000 annually.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.  
\* \* \*

It being the opinion of the court, that the Act [of Congress] incorporating the bank [Bank of the United States] is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is

no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are adduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnance exists, that authority which is supreme must control, not yield to that over which it is supreme. \* \* \*

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign powers of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the State of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to

the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all. \* \* \*

All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them. \* \* \*

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insig-

nificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. \* \* \*

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every

argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

## NOTES

1. For discussions of the case in its historical setting see 1 Warren, *The Supreme Court in United States History* (1922), ch. 12, and 4 Beveridge, *The Life of John Marshall* (1919), 282 *et seq.*

2. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481 (1829) involved a city tax on bonds, notes, and stock, including United States stock but exempting South Carolina stock, stocks of the incorporated banks of South Carolina and the United States bank. Chief Justice Marshall's opinion holding the tax invalid (Justices Johnson and Thompson dissenting) was not based upon the slight discriminatory features of the tax but upon the proposition that it cast a burden upon the power of the government to borrow money on the credit of the United States.

3. In *First National Bank v. Fellows*, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. 734 (1917), a statute of Congress was sustained giving to the Federal Reserve Board authority "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

## THE COLLECTOR v. DAY.

Supreme Court of the United States, 1870.

11 Wall. 113, 20 L. ed. 122.

Error to the Circuit Court for the District of Massachusetts.

MR. JUSTICE NELSON delivered the opinion of the Court. \* \* \*

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a state?

In *Dobbins v. The Commissioners of Erie County*, 16 Pet. 435, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the states, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of *McCulloch v. Maryland*, 4 Wheat. 316, and *Weston v. Charleston*, 2 Pet. 449, were referred to as settling the principle that governed the case, namely, "that the state governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." \* \* \*

It is conceded in the case of *McCulloch v. Maryland*, that the power of taxation by the states was not abridged by the grant of a similar

power to the government of the Union; that it was retained by the states, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the states against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the states might impose taxation to an extent that would impair, if not wholly defeat, the operations of the federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins v. The Commissioners of Erie*, which determined that the states were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a state. \* \* \*

The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states. \* \* \*

Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the states. \* \* \* Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of

officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. \* \* \*

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states? \* \* \*

It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, is subject to the control of another and distinct government, can exist only at the mercy of that government. \* \* \*

Judgment Affirmed.

MR. JUSTICE BRADLEY, dissenting.

I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the state governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the state government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the state governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the state governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the state governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other states and their citizens are equally interested with the state which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government,

which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the state governments which will be interfered with by federal taxation? If a state incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the state governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

## NOTES

1. In holding that the reasoning of *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L. ed. 1022 (1842) applied to taxation by the federal government of the salary of a state officer the Supreme Court ignored Chief Justice Marshall's view (restated with telling force in Mr. Justice Bradley's dissent) that the situation involved where the whole taxed all its parts was different from that where a part taxed the operations of the whole. After *Collector v. Day*, state and federal tax immunities were considered to be substantially reciprocal and the area of immunity tended to grow. The immunity was held to cover not only federal securities (*Weston v. Charleston*, supra) but state bonds and the interest thereon as well. *Mercantile National Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. 826 (1887); *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, 39 L. ed. 759, 39 L. ed. 1108, 15 Sup. Ct. 673, 15 Sup. Ct. 912 (1895). Sales of goods to the government were also held to be covered by the immunity on the theory that the government was one of the parties to the contract of sale and was thus adversely affected by a tax on the transaction. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 72 L. ed. 857, 48 Sup. Ct. 451, 56 A. L. R. 583 (1928); *Graves v. Texas Co.*, 298 U. S. 393, 80 L. ed. 1236, 56 Sup. Ct. 818 (1936).

The immunity rule was limited, however, by cases holding that when a state engages in a business enterprise, as distinguished from a function traditionally governmental, the business is not exempted from federal taxation. Thus, in *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 110 (1905), the State was required to pay federal excise taxes on the liquor sold by its dispensaries, and in *Ohio v. Helvering*, 292 U. S. 360, 78 L. ed. 1307, 54 Sup. Ct. 725 (1934) this view was reaffirmed and applied to the liquor monopolies set up in some states after the repeal of the Eighteenth Amendment. And in *Allen v. Regents of University System*, 304 U. S. 439, 82 L. ed. 1448, 58 Sup. Ct. 980 (1938), receipts from the University of Georgia athletic contests were held subject to federal taxation. Another limitation on the immunity rule was the view that independent contractors, not themselves government employees, may claim tax exemption only by showing that to tax them is to impose a direct and substantial burden on the government. Thus, in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. 172 (1926) it was held that a partnership

of engineers acting as consultants to states and municipalities in regard to water supply and sewage disposal systems were liable to federal income taxation.

A judicial trend toward further limitation of the doctrine of intergovernmental tax immunity was discernible in a case decided in the early thirties. In *Long v. Rockwood*, 277 U. S. 142, 72 L. ed. 824, 48 Sup. Ct. 463 (1928) the court had held, by a bare majority, that a state could not tax income derived from patents issued by the United States. In *Fox Film Corporation v. Doyal*, 286 U. S. 123, 76 L. ed. 1010, 52 Sup. Ct. 546 (1932) this decision was overruled, the court taking the view that exemption of patents and copyrights from taxation by the state benefits only the holder of these rights and not the federal government.

*Helvering v. Gerhardt*, 304 U. S. 405, 82 L. ed. 1427, 58 Sup. Ct. 969 (1938) was the first case that evidenced an unmistakable willingness to limit the immunity doctrine in the field of official salaries. Here it was held that the imposition of a non-discriminatory income tax on salaries of employees of the Port of New York Authority did not place an unconstitutional burden on the States of New York and New Jersey, which had created the Port Authority. The court said that to avoid the tax a state must show that the burden on it is actual and substantial, and not conjectural. Here the burden was deemed to be so speculative and uncertain that to allow the immunity would restrict the federal taxing power without affording any corresponding tangible protection to the State government. While the decision did not specifically overrule *Collector v. Day*, it prepared the way for further reconsideration of the problems involved.

#### GRAVES v. NEW YORK EX REL. O'KEEFE.

Supreme Court of the United States, 1939.

306 U. S. 466, 83 L. ed. 927, 59 Sup. Ct. 595, 120 A. L. R. 1466.

MR. JUSTICE STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the state of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the federal government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of \$2,400. In his income tax return for that year he included his salary as subject to the New York state income tax imposed by Art. 16 of the Tax Law of New York (Consol. Laws, c. 60). Subdivision 2f of § 359, since repealed, exempted from the tax "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States \* \* \*." Petitioners, New York State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from state taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government and that he, during the taxable year, was an employee of the federal government engaged in the performance of a governmental function.

On review by certiorari the Board's action was set aside by the Appellate Division of the Supreme Court of New York, 253 App. Div. 91; 1 N. Y. S. 2d 195, whose order was affirmed by the Court of Appeals. 278 N. Y. 691; 16 N. E. 2d 404. Both courts held respondent's salary was free from tax on the authority of *New York ex rel. Rogers v. Graves*, 299 U. S. 401, which sustained the claim that New York could not constitutionally tax the salary of an employee of the Panama Rail Road Company, a wholly-owned corporate instrumentality of the United States. We granted certiorari, 305 U. S. 592, the constitutional question presented by the record being of public importance.

The Home Owners' Loan Corporation was created pursuant to § 4 (a) of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. § 1461 et seq., which was enacted to provide emergency relief to home owners, particularly to assist them with respect to home mortgage indebtedness. The corporation, which is authorized to lend money to home owners on mortgages and to refinance home mortgage loans within the purview of the Act, is declared by § 4 (a) to be an instrumentality of the United States. Its shares of stock are wholly government-owned. § 4 (b). Its funds are deposited in the Treasury of the United States, and the compensation of its employees is paid by drafts upon the Treasury.

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. *Cf. Kay v. United States*, 303 U. S. 1. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U. S. 151, 158-159; *South Carolina v. United States*, 199 U. S. 437, 451-452; *Helvering v. Gerhardt*, 304 U. S. 405, 412-415. And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. See *McCulloch v. Maryland*, *supra*, 421-422; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 208; *Federal Land Bank v. Crosland*, 261 U. S. 374; *New York ex rel. Rogers v. Graves*, *supra*.

The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a

corporate instrumentality of the federal government, imposes an unconstitutional burden upon that government. The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning. *McCulloch v. Maryland*, *supra*, 435-436, and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. *Helvering v. Gerhardt*, *supra*, 412-413, 416.

So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. \* \* \* Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in § 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the Congressional intention is not to be gathered from the statute by implication. *Cf. Baltimore National Bank v. State Tax Comm'n*, *supra*.

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the

nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are substantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313, 314; *Hale v. State Board*, 302 U. S. 95, 108; *Helvering v. Gerhardt*, *supra*; *cf. Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Fox Film Corp. v. Doyal*, 286 U. S. 123; *James v. Dravo Contracting Co.*, *supra*, 149; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was im-

mune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and employees. This assumption made with respect to the salary of a governmental officer in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, and in *Collector v. Day*, 11 Wall. 113, was later extended to confer immunity on income derived by a lessee from lands leased to him by a government in the performance of a governmental function, *Gillespie v. Oklahoma*, 257 U. S. 501; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, and cases cited, although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a governmental project was rejected both in the case of a contractor with a state, *Metcalf & Eddy v. Mitchell*, *supra* and of a contractor with the national government, *James v. Dravo Contracting Co.*, *supra*.

The ultimate repudiation in *Helvering v. Mountain Producers Corp.*, *supra*, of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the re-examination by this Court, in the *Gerhardt* case, of the theory underlying the asserted immunity from taxation by one government of salaries of employees of the other. It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell*, *supra*, 523-524; *James v. Dravo Contracting Co.*, *supra*, 156-158. It was further pointed out that, as applied to the taxation of the salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the *Gerhardt* case the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from federal income tax, even though the Authority be

regarded as not subject to federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the states creating it, only so far as the burden of the tax was economically passed on to the employer; that a non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials. The Court concluded that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the national government in order to secure to the state a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the *Gerhardt* case that in terms of constitutional tax immunity a federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a state and the corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from state taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from state taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are now concerned. The burden on government of a non-discriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a state or national government is concerned. The determination in the *Gerhardt* case that the federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from federal in-

come tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of state employees, stated at length in the *Gerhardt* case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the national government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector v. Day*, *supra*, and in *New York ex rel. Rogers v. Graves*, *supra*, is contrary to the reasoning and to the conclusions reached in the *Gerhardt* case and in *Metcalf & Eddy v. Mitchell*, *supra*; *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279; *James v. Dravo Contracting Co.*, *supra*; *Helvering v. Mountain Producers Corp.*, *supra*; *McLoughlin v. Commissioner*, 303 U. S. 218. In their light the assumption can no longer be made. *Collector v. Day*, *supra*, and *New York ex rel. Rogers v. Graves*, *supra*, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would

impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

Reversed.

[CHIEF JUSTICE HUGHES concurred "in the result." JUSTICE FRANKFURTER wrote a separate concurring opinion. JUSTICES BUTLER and McREYNOLDS dissented.]

#### NOTES

1. The Public Salary Tax Act of 1939 extended the provisions of the federal Income Tax Act to include personal services of officers or employees of a state, and of its political subdivisions and instrumentalities. The United States also consented to taxation by the states of the salaries of officers or employees of the United States and of its instrumentalities, provided such taxation does not discriminate against such officers or employees because of the source of their compensation.

2. *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 Sup. Ct. 208, 114 A. L. R. 318 (1937) sustained a state tax on the gross earnings from construction contracts with the United States. The contracting company had relied upon *Panhandle Oil Co. v. Mississippi*, supra, and *Graves v. Texas Co.*, supra, which had invalidated state gasoline taxes on gasoline sold to federal agencies. These cases were said to be limited to their particular facts and were later overruled in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 Sup. Ct. 43, 140 A. L. R. 615 (1941), which sustained a state sales tax on the purchase of building materials by a contractor constructing an army camp for the United States under the cost-plus fixed-fee basis, the court viewing the tax as the normal incident of the existence of two governments functioning within the same territory. While the tax did not involve a direct sale to the United States or one of its agencies, it was conceded that its economic burden was passed on to the United States.

3. Overruling five earlier decisions the court held in *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, 93 L. ed. 721, 69 Sup. Ct. 561 (1949) that lessees of mineral rights in allotted and restricted Indian lands were not entitled to immunity from taxes imposed by Oklahoma upon the production of petroleum. The taxes were nondiscriminatory; one was laid upon the gross value of production and was in lieu of all other local ad valorem property taxes; another was an excise tax on every barrel of petroleum produced. The court said that approval of a judicial doctrine of immunity could not be inferred from mere Congressional silence. "We do not imply, by this decision, that Congress does not have power to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action. The question whether immunity shall be extended in situations like these is essentially legislative in character."

#### PITTMAN v. HOME OWNERS' LOAN CORPORATION.

Supreme Court of the United States, 1939.

308 U. S. 21, 84 L. ed. 11, 60 Sup. Ct. 15, 124 A. L. R. 1263.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Home Owners' Loan Corporation brought this proceeding in the Baltimore City Court for a writ of mandamus requiring the Clerk

of the Superior Court of Baltimore to record a mortgage executed to the Corporation upon the payment of the ordinary recording charge and without affixing stamps for the state recording tax. Demurrer to the petition was overruled, the Clerk did not avail himself of the opportunity to answer, and mandamus was granted. The order was affirmed by the Court of Appeals. 175 Md. 512; 2 A. 2d 689. We granted certiorari. 306 U. S. 628.

The Maryland statute imposes a tax upon every mortgage, recorded or offered for record, at the rate of ten cents for each \$100, or fraction thereof, of the principal amount of the debt secured by the mortgage. As the Home Owners' Loan Corporation is expressly declared to be an instrumentality of the United States (Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128) and the mortgage was acquired in that capacity, the Court of Appeals held the tax as thus applied to be invalid.

The court relied upon our decision in *Federal Land Bank v. Crosland*, 261 U. S. 374. The question there related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank. The Federal Farm Loan Act of 1916 provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation." 39 Stat. 360, 380. We held that the state tax, as distinguished from a reasonable fee to meet the expenses of the registry, constituted a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it, and that the tax on the mortgage in question was beyond the power of the state.

Petitioner suggests that the *Crosland* case may be distinguished; that the Alabama tax was imposed on the lender, whereas the Maryland tax is on the privilege of recording the instrument and the statute is silent as to the one who shall pay the tax; also that the Federal Farm Loan Act expressly declared the mortgages of Federal Land Banks to be instrumentalities of the Federal Government. The Court of Appeals thought these differences to be immaterial. As to the first, the court rightly observed that in the *Crosland* case the provision for the payment of tax by the lender was regarded as having no determining significance. We said that "whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States." 261 U. S., pp. 378, 379. Here, also, the tax is imposed upon the mortgage and is graded according to the amount of the loan, and the condition attached to the registration is a practical method of collection. The recording sought was for the protection of the interest of the Home Owners' Loan Corporation. In fact, the mortgage in the instant case was offered

for record by the Corporation and the tax was demanded from the Corporation.

The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is "loans." We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation "shall be secured by a duly recorded home mortgage." Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland* case.

Alive to this consideration, petitioner advances a broader contention, asking us to review and overrule the *Crosland* decision as being out of harmony with correct principle. Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot "grant an immunity of greater extent than the constitutional immunity."

We assume here, as we assumed in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch v. Maryland*, 4 Wheat. 316, 421, 422; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 208, 209; *Graves v. New York ex rel. O'Keefe*, *supra*. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve." *McCulloch v. Maryland*, *supra*, p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, § 8, par. 18. In the exercise of this power to protect the lawful activities of its

agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. The Shreveport Case, 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See *e. g.*, *Bank v. Supervisors*, 7 Wall. 26, 31; *Choate v. Trapp*, 224 U. S. 665, 668, 669; *Smith v. Kansas City Title Co.*, *supra*, p. 207; *Trotter v. Tennessee*, 290 U. S. 354, 356; *Lawrence v. Shaw*, 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

The judgment of the state court is

Affirmed.

### ESSO STANDARD OIL v. EVANS.

Supreme Court of the United States, 1953.  
345 U. S. 495, 97 L. ed. 1174, 73 Sup. Ct. 800.

MR. JUSTICE REED delivered the opinion of the Court.

These are appeals from the Supreme Court of Tennessee, affirming a Chancery Court judgment for some \$196,000 in favor of the State Commissioner of Finance and Taxation, against Esso Standard Oil Co., the party of record in No. 330. Ultimately liable, the United States intervened in that litigation and brought a separate appeal here, No. 378. It contended that the State tax involved is barred by principles of sovereign immunity. This is a test case. We are told that if the tax is sustained, a liability for upwards of \$4,000,000 will result.

The facts are these. During World War II the Government was actively engaged in the production and procurement of high octane aviation fuel. All such gasoline produced was purchased before it left the refinery and, by formal passage of title, became immediately the property of the Defense Supplies Corporation, a corporation wholly owned by the Reconstruction Finance Corporation, 6 Fed. Reg. 2972, as amended 6 Fed. Reg. 3363, and specifically exempt from state storage and use taxes, 55 Stat. 248. Release from storage by the producing companies occurred only on notification by the Petroleum Administration for War, in accordance with allocation of specific lots of fuel to various official consumers, including the Services and the Allies. The Air Force, in particular, then arranged for transportation of its various allotments—sometimes by government carrier—from the refineries to the nearest consuming point.

We are concerned with certain lots of Air Force fuel produced in the South at various plants and shipped through Memphis, Tennessee. It appears that in 1943 a shortage of storage facilities developed in the area, forcing resort to privately owned tanks. Appellant Esso and the Lion Oil Company were able to provide such service through tanks at various points near Memphis. As a result, the Government entered into extensive contracts with Esso which in turn rented the Lion tanks, providing that the Company would "render services \* \* \* in receiving, storing, handling and loading Government-owned fuel." The Company's service charge ranged from 18/100 of a cent to 6 3/10 cents per gallon. The United States agreed to assume liability for all state taxes. Pursuant thereto, allotments of gasoline were moved by barge from refineries to these private tanks, stored there pending need, and later reshipped by truck to consuming air fields on order of the Air Force. The operations continued from 1943 through 1946 under several contracts of similar import.

August 2, 1949, the State, after investigation, demanded that Esso pay taxes in connection with these operations under the Tennessee gasoline tax, 2 Williams' Tenn. Code §§ 1126-1147. This statute, in material part, provided:

"Every distributor when engaged in such business in this state, shall pay to the state controller, through commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state, during such year; \* \* \*." § 1127. \* \* \*

Esso paid the required tax for the privilege of storing gasoline measured by the amount stored during the month of January 1944—the statute of limitations having run in regard to 1943 operations—and sued to recover. The Government intervened in the trial court and entered its plea, echoed by Esso, that the tax was barred by the constitutional doctrine of intergovernmental immunity; that to construe the Tennessee statute as applicable to storage of gasoline owned by the United States makes it repugnant to the Constitution and void. Both the Chancery Court and the Court of Appeals rejected the claimed immunity and held the statute valid as applied. We noted our probable jurisdiction on appeal. 28 U. S. C. § 1257(2) [F. C. A. 28 § 1257(2)].

The appellants take a firm stand on *United States v. Allegheny County*, 322 U. S. 174, which they contend is an analogous case that compels reversal of this decision. They say, in effect, that the tax here is no less "on" the property of the Federal Government than it was in that case, and in support of this claimed similiarity they point to the following factors: that the statute grew out of the state's effort to tax sales to the final consumer, that the tax is paid but once, and this by the first producer or importer, and that refunds when the fuel is subsequently exported are provided. Thus the "true character" of the tax, as one "on property of the United States," it is claimed, is precisely the same as that in *Allegheny County*.

*Allegheny County*, however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing the state ad valorem property tax, Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. *Id.*, 322 U. S. at pages 179-180, 186. So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was "to lay an ad valorem general property tax on property owned by the United States", *Id.*, 322 U. S. at page 185, and therefore invalid. Our holding was not "dependent upon the ultimate resting place of the economic burden of the tax." *Id.*, 322 U. S. at page 189.

This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not "on" the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James v. Dravo Contracting Co.*, 302 U. S. 134, 151, this has been no fatal flaw. We must look further, and find either a stated immunity created by Congress in the exercise of a constitutional power, or one arising by implication from our constitutional system of dual government.

Neither condition applies to the kind of governmental operations here involved. There is no claim of a stated immunity. And we find none implied. The United States, today, is engaged in vast and complicated operations in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their

activities are useful to the Government. We hold, therefore, that sovereign immunity does not prohibit this tax. \* \* \* Affirmed.

The CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE JACKSON dissent.

MR. JUSTICE FRANKFURTER, not having heard the argument, took no part in the consideration or decision of this case.

# NOTES

1. The Supreme Court has upheld other specific Congressional exemptions of the property of federal agencies and instrumentalities from state taxation. In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U. S. 95, 86 L. ed. 65, 62 Sup. Ct. 1 (1941) it was held that the Federal Farm Loan Act of 1916 exempts federal land banks from sales taxes imposed by states on building materials for improvement of farm property acquired in foreclosure proceedings.

In *Maricopa County v. Valley National Bank*, 318 U. S. 357, 87 L. ed. 834, 63 Sup. Ct. 587 (1943) the court sustained an Act of Congress of 1936 which enacted that preferred shares of national banks, when held by the Reconstruction Finance Corporation, should not be taxed by states or their political subdivisions. Before this statute was enacted, the court had held in *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, 80 L. ed. 586, 56 Sup. Ct. 417 (1936) that such shares were subject to state taxation, even when held by the R. F. C. In the *Maricopa County* case the court said: "Little need be said in answer to the argument that the Act violates the Tenth Amendment. The authority by which the taxes in question were levied did not stem from the powers 'reserved to the states' under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation. \* \* \* Hence when Congress withdrew the privilege which it had previously granted, it was not curtailing any political power which the Constitution had reserved to Arizona. \* \* \*"

In *Cleveland v. United States*, 323 U. S. 329, 89 L. ed. 274, 65 Sup. Ct. 280 (1945), a case involving state taxation of property of the Federal Public Housing Authority, the statutory exemption was sustained, the court saying: "And Congress may exempt property owned by the United States or its instrumentality from state taxation in furtherance of the purposes of the federal legislation. This is settled by such an array of authority that citation would seem unnecessary."

In *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 96 L. ed. 257, 72 Sup. Ct. 257 (1952) the court held that the purchase and use of materials and supplies by private corporations in performance of cost-plus fixed-fee contracts with the Atomic Energy Commission to operate government-owned plants for the production of fissionable materials at Oak Ridge, Tennessee, and to manage the government-owned town of Oak Ridge, were activities of the Commission exempt from Tennessee sales and use taxes under the Atomic Energy Act of 1946.

In *Dameron v. Brodhead*, 345 U. S. 322, 97 L. ed. 1041, 73 Sup. Ct. 721, 32 A. L. R. (2d) 612 (1953) the court held constitutional the provision of the Soldiers' and Sailors' Civil Relief Act of 1940 that the taxable domicile of servicemen shall not be changed by military assignments. The Act provided that "personal property shall not be deemed to be located or present in or to have a situs for taxation" in the state of temporary presence in any case. The court said that the effect of the statute was to free servicemen from both income and property taxes imposed by any state by virtue of their presence there as a

result of military orders. "It saved the sole right of taxation to the state of original residence whether or not that state exercised the right. Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces." Justices Douglas and Black dissented.

2. For more recent discussions of the cases involving intergovernmental tax immunity see Pond, *Intergovernmental Immunity: A Comparative Study of the Federal System*, 26 Iowa L. Rev. 272 (1941); Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 633 (1945), and *The Remnant of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 757 (1945).

### PENN DAIRIES v. MILK CONTROL COMMISSION.

Supreme Court of the United States, 1943.  
318 U. S. 261, 87 L. ed. 748, 63 Sup. Ct. 617.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

Decision in this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, Purdon's Pa. Stat. Ann., Tit. 31, § 700j, may constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state in a place subject to its jurisdiction. \* \* \*

[Penn Dairies supplied milk under a contract calling for prices substantially below the minimum prices fixed by the Milk Control Commission, to the United States government at a military encampment located on lands owned by the Commonwealth of Pennsylvania. The encampment was established under a permit from the Commonwealth which did not involve surrender of state jurisdiction or authority over the area occupied by the camp. The Milk Control Commission, after hearings, denied Penn Dairies' application for a milk dealer's license for the year beginning May 1, 1941, because of its sale and delivery of the milk to the encampment at prices below the fixed minima. The Pennsylvania courts sustained the denial of the license and the dairy appealed to this Court.]

Appellants urged that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.

Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article I, § 8, cl. 12, and with the support of the supremacy clause, Article VI, § 2, could declare state regulations like the present inapplicable to sales to the

government. *Cf.* *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 33; *Federal Land Bank v. Bismarck Co.*, 314 U. S. 95, 101-04; *Parker v. Brown*, 317 U. S. 341, 350-351, and cases cited. But there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U. S. 276; *Johnson v. Maryland*, 254 U. S. 51; *Hunt v. United States*, 278 U. S. 96; *Arizona v. California*, 283 U. S. 423. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524-5; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149; *Buckstaff Co. v. McKinley*, 308 U. S. 358, 362-63 and cases cited; *cf.* *Susquehanna Co. v. Tax Comm'n*, 283 U. S. 291, 294; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385-86, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. *Alabama v. King & Boozer*, 314 U. S. 1, 9, and cases cited; *Baltimore & Annapolis R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. 2d 734, s. c., *United States v. Baltimore & Annapolis R. Co.*, 308 U. S. 525.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270-71. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforceable and enforced will increase the price of milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v. Seelig*, 294 U. S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, *supra*; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Balti-*

more & Annapolis R. Co. v. Lichtenberg, *supra*; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *Stewart & Co. v. Sadrakula*, 309 U. S. 94.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. \* \* \*

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. \* \* \*

[The majority found no such legislation or expressed policy and the judgment was affirmed. On the latter point, JUSTICES DOUGLAS, BLACK and JACKSON dissented.]

## NOTES

1. In *Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 87 L. ed. 761, 63 Sup. Ct. 628 (1943), it was held that California was precluded by the Constitution (Art. I, § 8, cl. 17, granting to Congress the power of "exclusive legislation" over territory ceded by a state, and the enlargement of this authority by the "necessary and proper clause" to include the power to enact all appropriate incidental legislation) from revoking the license of a milk dealer for selling milk to the War Department at less than the minimum prices fixed by state law, where the sales and deliveries were made on Moffett Field, which is subject to the exclusive jurisdiction of the United States, having been acquired by act of Congress in 1931. *Penn Dairies v. Milk Control Commission* was distinguished on the ground that there the sales occurred within the state's jurisdiction, and there was absent specific national legislation excluding the operation of the state's regulatory laws. Justices Frankfurter and Murphy wrote separate dissenting opinions.

2. *Howard v. Commissioners of Sinking Fund*, 344 U. S. 624, 97 L. ed. 617, 73 Sup. Ct. 465 (1953) sustained an occupational license tax of the City of Louisville, computed on gross receipts from work done or business conducted in the city, as applied to employees of a naval ordnance plant located on land owned by, and under the jurisdiction of, the United States since 1941. (By ordinances enacted in 1947 and 1950, the city had annexed certain territory, including the ordnance plant tract, which annexation was not challenged by the United States.) The court based its holding on the fact that Congress had made recession of its exclusive jurisdiction over such federal area to the extent of permitting the taxation involved. Justices Douglas and Black dissented.

## NEW YORK v. UNITED STATES.

Supreme Court of the United States, 1946.  
326 U. S. 572, 90 L. ed. 326, 66 Sup. Ct. 310.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE RUTLEDGE joined.

Section 615(a)(5) of the 1932 Revenue Act, 47 Stat. 169, 264, imposed a tax on mineral waters. The United States brought this suit to recover taxes assessed against the State of New York on the sale of mineral waters taken from Saratoga Springs, New York. The state claims immunity from this tax on the ground that "in the bottling and sale of the said waters the defendant State of New York was engaged in the exercise of a usual, traditional and essential governmental function." The claim was rejected by the District Court and judgment went for the United States. 48 F. Supp. 15. The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit. 140 F. (2d) 608. The strong urging of New York for further clarification of the amenability of States to the taxing power of the United States led us to grant certiorari. 322 U. S. 724.

On the basis of authority the case is quickly disposed of. When States sought to control the liquor traffic by going into the liquor business, they were denied immunity from federal taxes upon the liquor business. *South Carolina v. United States*, 199 U. S. 437; *Ohio v. Helvering*, 292 U. S. 360. And in rejecting a claim of immunity from federal taxation when Massachusetts took over the street railways of Boston, this Court a decade ago said: "We see no reason for putting the operation of a street railway [by a State] in a different category from the sale of liquors." *Helvering v. Powers*, 293 U. S. 214, 227. We certainly see no reason for putting soft drinks in a different constitutional category from hard drinks. See also *Allen v. Regents*, 304 U. S. 439.

One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract. But there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases. The argument pressed by New York and the forty-five other states who, as *amici curiae*, have joined her deserves an answer. \* \* \*

\* \* \* the fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nour-

ished by the phrase of Chief Justice Marshall that "the power to tax involves the power to destroy" *McCulloch v. Maryland*, 4 Wheat. 316, 431. To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. See *Holmes, J., in Long v. Rockwood*, 277 U. S. 142, 148, and in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223. The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be "instrumentalities of government" for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Helvering v. Producers Corp.*, 303 U. S. 376; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480-81.

To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. When this Court for the first time relieved State officers from a non-discriminatory Congressional tax, not because of anything said in the Constitution but because of the supposed implications of our federal system, Mr. Justice Bradley pointed out the invalidity of the notion of reciprocal intergovernmental immunity. The considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities. The federal government is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid. "The taxation by the State governments of the instruments employed by the general government in the exercise of its powers," said Mr. Justice Bradley, "is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation." Since then we have moved away from the theoretical assumption that the National Government is burdened if its functionaries, like other citizens, pay for the upkeep of their State governments, and we have denied the implied constitutional immunity of federal officials from State taxes. *Graves v. N. Y. ex rel. O'Keefe*, *supra*. \* \* \*

In the meantime, cases came here, as we have already noted, in which States claimed immunity from a federal tax imposed generally on enterprises in which the State itself was also engaged. This problem did not arise before the present century, partly because State trading did not actively emerge until relatively recently, and partly because of the narrow scope of federal taxation. In *South Carolina v. United States*, 199 U. S. 437, immunity from a federal tax on a dispensary system, whereby South Carolina monopolized the sale of intoxicating liquors, was denied by drawing a line between taxation of the historically recognized governmental functions of a State, and business engaged in by a State of a kind which theretofore had been pursued by private enterprise. The power of the federal government thus to tax a liquor business conducted by the State was derived from an appeal to the Constitution "in the light of conditions surrounding at the time of its adoption." *South Carolina v. United States*, *supra*, at 457. That there is a Constitutional line between the State as government and the State as trader, was still more recently made the basis of a decision sustaining a liquor tax against Ohio. "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function. \* \* \* When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *Ohio v. Helvering*, *supra* at 369. When the Ohio case was decided it was too late in the day not to recognize the vast extension of the sphere of government, both State and national, compared with that with which the Fathers were familiar. It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature. "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." *Anderson v. Dunn*, 6 Wheat. 204, 226.

When this Court came to sustain the federal taxing power upon a transportation system operated by a State, it did so in ways familiar in developing the law from precedent to precedent. It edged away from reliance on a sharp distinction between the "governmental" and the "trading" activities of a State, by denying immunity from federal taxation to a State when it "is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from

federal taxation in order to safeguard the necessary independence of the State." *Helvering v. Powers*, *supra*, at 227. But this likewise does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the United States over State activities. To rest the federal taxing power on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers. See Wambaugh, *Present Scope of Government* (1897), 20 A. B. A. Rep. 307; Frankfurter, *The Public and Its Government* (1930). \* \* \*

In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as that of Art. IV, § 4, guaranteeing States a republican form of government, see *Pac. States Tel. & T. Co. v. Oregon*, 223 U. S. 118, which this Court has deemed not within its duty to adjudicate.

We have already held that by engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce. *United States v. California*, 297 U. S. 175. See also *University of Illinois v. United States*, 289 U. S. 48. Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce. There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a State-house; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. *Cf. Springfield Gas Co. v.*

Springfield, 257 U. S. 66; *University of Illinois v. United States*, supra, at 57; *Puget Sound Co. v. Seattle*, 291 U. S. 619. If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy." After all, the representatives of all the States, having, as the appearance of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. The restriction upon States not to make laws that discriminate against interstate commerce is a vital constitutional principle, even though "discrimination" is not a code of specifics but a continuous process of application. So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as "proprietary" against "governmental" activities of the States, or historically sanctioned activities of Government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Judgment affirmed.

[Mr. JUSTICE JACKSON took no part in the consideration or decision of this case. Mr. JUSTICE RUTLEDGE concurred in a separate opinion which is omitted.]

MR. CHIEF JUSTICE STONE concurring.

MR. JUSTICE REED, MR. JUSTICE MURPHY, MR. JUSTICE BURTON and I concur in the result. We are of the opinion that the tax here involved should be sustained and the judgment below affirmed.

In view of our decisions in *South Carolina v. United States*, 199 U. S. 437, *Ohio v. Helvering*, 292 U. S. 360, *Helvering v. Powers*, 292 U. S. 214, and *Allen v. Regents*, 304 U. S. 439, we would find it difficult not to sustain the tax in this case, even though we regard as untenable the distinction between "governmental" and "proprietary" interests on which those cases rest to some extent. But we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike.

Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government. But our difficulty with the for-

mula, now first suggested as offering a new solution for an old problem, is that a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. The counterpart of such undue interference has been recognized since Marshall's day as the implied immunity of each of the dual sovereignties of our constitutional system from taxation by the other. *McCulloch v. Maryland*, 4 Wheat. 316. We add nothing to this formula by saying, in a new form of words, that a tax which Congress applies generally to the property and activities of private citizens may not be in some instances constitutionally extended to the States, merely because the States are included among those who pay taxes on a like subject of taxation. If the phrase "non-discriminatory tax" is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. *Mayo v. United States*, 319 U. S. 441, 447-448. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty.

A State may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and States alike could be constitutionally applied to the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed. If it be said that private citizens do not own State-houses or public school buildings or receive tax revenues, it may equally be said that private citizens do not conduct a State-owned liquor business or derive revenue from a State-owned athletic field. Obviously Congress, in taxing property or income generally, is not taxing a State "as a State" because the State happens to own real estate or receive income. Whether a State or an individual is taxed, in each instance the taxable occasion is the same. The tax reaches the State because of the Congressional purpose to lay the tax on the subject matter chosen, regardless of who pays it. To say that the tax fails because the State happens to be the taxpayer is only to say that the State, to some extent undefined, is constitutionally immune from federal taxation. Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it. If we are to treat as invalid, because

discriminatory, a tax on "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations", it is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as unduly to infringe, in some manner, the performance of its functions as a government which the Constitution recognizes as sovereign.

It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524. \* \* \*

The problem is not one to be solved by a formula, but we may look to the structure of the Constitution as our guide to decision. \* \* \*

Since all taxes must be laid by general, that is, workable, rules, the effect of the immunity on the national taxing power is to be determined not quantitatively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation. Not the extent to which a particular State engages in the activity, but the nature and extent of the activity by whomsoever performed is the relevant consideration.

Regarded in this light we cannot say that the Constitution either requires or permits immunity of the State's mineral water business from federal taxation, or denies to the federal government power to lay the tax.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

If *South Carolina v. United States*, 199 U. S. 437, is to stand, the present judgment would have to be affirmed. For I agree that there is no essential difference between a federal tax on South Carolina's liquor business and a federal tax on New York's mineral water business. Whether *South Carolina v. United States* reaches the right result is another matter.

Mr. Justice Brandeis stated that "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406. But throughout the history of the

Court stare decisis has had only a limited application in the field of constitutional law. And it is a wise policy which largely restricts it to those areas of the law where correction can be had by legislation. Otherwise the Constitution loses its flexibility necessary if it is to serve the needs of successive generations.

I do not believe *South Carolina v. United States* states the correct rule. A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. Cf. *Helvering v. Gerhardt*, 304 U. S. 405, 426-427. A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in *South Carolina v. United States*, any activity in which a State engages within the limits of its police power is a legitimate governmental activity. Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty. Must it pay the federal government for the privilege of exercising that inherent power? If the Constitution grants it immunity from a tax on the issuance of securities, on what grounds can it be forced to pay a tax when it sells power or disposes of other natural resources?

One view, just announced, purports to reject the distinction which *South Carolina v. United States* drew between those activities of a State which are and those which are not strictly governmental, usual, or traditional. But it is said that a federal tax on a State will be sustained so long as Congress "does not attempt to tax a State because it is a State." Yet if that means that a federal real estate tax of general application (apportioned) would be valid if applied to a power dam owned by a state but invalid if applied to a state-house, the old doctrine has merely been poured into a new container. If, on the other hand, any federal tax on any state activity were sustained unless it discriminated against the State, then a constitutional rule would be fashioned which would undermine the sovereignty of the States as it has been understood throughout our history. Any such change should be accomplished only by constitutional amendment. The doctrine of state immunity is too intricately involved in projects which have been launched to be whittled down by judicial fiat.

\* \* \* The Supremacy Clause, Article VI, clause 2, applies to federal laws within the powers delegated to Congress by the States. But it is antagonistic to the very implications of our federal system to say that the power of Congress to lay and collect taxes, Article I, § 8, includes the power to tax any state activity or function so long as the tax does not discriminate against the States. \* \* \*

A tax is a powerful, regulatory instrument. Local government in this free land does not exist for itself. The fact that local government may enter the domain of private enterprise and operate a project for profit does not put it in the class of private business enterprise for tax purposes. Local government exists to provide for the welfare of its people, not for a limited group of stockholders. If the federal government can place the local governments on its tax collector's list, their capacity to serve the needs of their citizens is at once hampered or curtailed. The field of federal excise taxation alone is practically without limits. Many state activities are in marginal enterprises where private capital refuses to venture. Add to the cost of these projects a federal tax and the social program may be destroyed before it can be launched. In any case, the repercussions of such a fundamental change on the credit of the States and on their programs to take care of the needy and to build for the future would be considerable. To say the present tax will be sustained because it does not impair the State's functions of government is to conclude either that the sale by the State of its mineral water is not a function of government or that the present tax is so slight as to be no burden. The former obviously is not true. The latter overlooks the fact that the power to tax lightly is the power to tax severely. The power to tax is indeed one of the most effective forms of regulation. And no more powerful instrument for centralization of government could be devised. For with the federal government immune and the State subject to tax, the economic ability of the federal government to expand its activities at the expense of the States is at once apparent. That is the result whether the rule of South Carolina v. United States be perpetuated or a new rule of discrimination be adopted.

The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy.

The immunity of the States from federal taxation is no less clear because it is implied. The States on entering the Union surrendered some of their sovereignty. It was further curtailed as various Amendments were adopted. But the Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution is a compact between sovereigns. The power of one sovereign to tax another is an innovation so startling as to require explicit authority if it is to be allowed. If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status. They become subject to interference

and control both in the functions which they exercise and the methods which they employ. They must pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution, whether, as here, they are disposing of their natural resources, or tomorrow they issue securities or perform any other acts within the scope of their police power.

Of course, the levying of the present tax does not curtail the business of the state government more than it does the like business of the citizen. But the same might be true in the case of many state activities which have long been assumed to be immune from federal taxation. When a municipality acquires a water system or an electric power plant and transmission facilities, it withdraws projects from the field of private enterprise. Is the tax immunity to be denied because a tax on the municipality would not curtail the municipality more than it would the prior private owner? Is the municipality to be taxed whenever it engages in an activity which once was in the field of private enterprise and therefore was once taxable? Every expansion of state activity since the adoption of the Constitution limits the reach of federal taxation if state immunity is recognized. Yet none would concede that the sovereign powers of the States were limited to those which they exercised in 1787. Nor can it be said that if the present tax is not sustained there will be withdrawn from the taxing power of the federal government a subject of taxation which has been traditionally within that power from the beginning. Not until *South Carolina v. United States* was it held that so-called business activities of a State were subject to federal taxation. That was after the turn of the present century. Thus the major objection to the suggested test is that it disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution. \* \* \*

#### NOTES

1. Property owned by the United States is not subject to state taxation even though it is not being devoted to governmental use. In *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. 670 (1886) land acquired by the United States at tax foreclosure and held for resale was held to be exempt from assessment and sale for state taxes, the court saying that "whether the property of the United States shall be taxed under the laws of a state depends upon the will of its owner, the United States, and no state can tax the property of the United States without their consent."

2. For a discussion of the principal case see Note, *Intergovernmental Tax Immunity: The Saratoga Springs Case*, 55 Yale L. J. 805 (1946).

## UNITED STATES v. CALIFORNIA.

Supreme Court of the United States, 1936.  
297 U. S. 175, 80 L. ed. 567, 56 Sup. Ct. 421.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a suit brought by the United States against the State of California in the District Court for northern California to recover the statutory penalty of \$100 for violation of the federal Safety Appliance Act, § 2, Act of March 2, 1893, c. 196, 27 Stat. 531, 45 U. S. C. § 2, and § 6 of the Act as amended April 1, 1896, 29 Stat. 85, 45 U. S. C. § 6.

The complaint alleges that California, in the operation of the state-owned State Belt Railroad, is a common carrier engaged in interstate transportation by railroad, and that it has violated the Safety Appliance Act by hauling over the road a car equipped with defective coupling apparatus. Upon the trial, without a jury, upon stipulated facts, the district court gave judgment for the United States. The Court of Appeals for the Ninth Circuit reversed, 75 F. (2d) 41, on the ground that as exclusive jurisdiction of suits to which a state is a party is conferred upon this Court by § 233 of the Judicial Code, 36 Stat. 1156, 28 U. S. C. 341, the District Court was without jurisdiction of the cause. We granted certiorari to review the case as one involving questions of public importance, upon a petition of the government which urged that the state is a common carrier by railroad, subject to the Safety Appliance Act, and, under its provisions, to suit in the district court to recover penalties for violation of the Act. \* \* \*

1. Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. *United States v. Brooklyn Terminal*, 249 U. S. 296, 304. The State Belt Railroad is owned and operated by the state, \* \* \*. It parallels the water front of San Francisco harbor and extends onto some forty-five state-owned wharves. It serves directly about one hundred and seventy-five industrial plants, has track connection with one interstate railroad, and, by wharf connections with freight car ferries, links that and three other interstate rail carriers with freight yards in San Francisco leased to them by the state. It receives and transports from the one to the other, by its own engines, all freight cars, loaded and empty, and the freight they contain, offered to it by railroads, steamship companies and industrial plants. The larger part of this traffic has its origin or destination in states other than California. For the transportation service it makes a flat charge per car. \* \* \*

2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net

proceeds of operation for harbor improvement, \* \* \*, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 624; *Green v. Frazier*, 253 U. S. 233; *Jones v. Portland*, 245 U. S. 217. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. *United States v. Louisiana*, 290 U. S. 70, 74, 75; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co.*, 257 U. S. 563; *Shreveport Rate Cases*, 234 U. S. 342. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control of Congress, acting within the commerce clause, *New York v. United States*, 257 U. S. 591, as are state agencies created to effect a public purpose, see *Sanitary District of Chicago v. United States*, 266 U. S. 405; *Board of Trustees v. United States*, 289 U. S. 48; see *Georgia v. Chattanooga*, 264 U. S. 472. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. *Helvering v. Powers*, 293 U. S. 214, 225; *Ohio v. Helvering*, 292 U. S. 360; *South Carolina v. United States*, 199 U. S. 437; see *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina v. United States*, *supra*. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the ple-

nary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, *Swinson v. Chicago, St. Paul, M. & O. Ry. Co.*, 294 U. S. 529; *Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, 594; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 17, and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. *Southern Ry. Co. v. United States*, 222 U. S. 20; *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 214. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection. \* \* \*

[The Court further held that Congress had given district courts jurisdiction over a suit against a state in actions under the Safety Appliance Act.] Judgment reversed.

#### NOTE

1. The University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted at the rates prescribed by the Tariff Act of 1922. The university paid under protest, claiming that as a state instrumentality, discharging a governmental function, it was entitled to import the articles duty free. The custom duty was sustained, since the control of importation does not rest with the state but with Congress. The Supreme Court said, through Chief Justice Hughes: "To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles." *Board of Trustees of University of Illinois v. United States*, 289 U. S. 48, 77 L. ed. 1025, 53 Sup. Ct. 509 (1933). See also, *Johnson, When the Importer is a State University, May the Government Collect a Duty?* 27 Mich. L. Rev. 499 (1929).

## UNITED STATES v. LANZA.

Supreme Court of the United States, 1922.  
260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct. 141.

[The defendants were indicted in the United States District Court for the Western District of Washington charged with manufacturing intoxicating liquor, transporting it and having it in their possession in violation of the National Prohibition Act. The defendants pleaded in bar a prior conviction for the same acts in the Superior Court of Whatcom County, State of Washington, wherein they had been tried upon an information charging them with having done these acts in violation of a state prohibition statute. The United States District Court sustained the plea and ordered the indictment dismissed. The United States took this writ of error under the Criminal Appeals Act (c. 2564, 34 Stat. 1246) to reverse the order.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court. \* \* \*

The defendants insist that two punishments for the same act, one under the National Prohibition Act and the other under a state law, constitute double jeopardy under the Fifth Amendment; and in support of this position it is argued that both laws derive their force from the same authority,—the second section of the [Eighteenth] Amendment,—and therefore that in principle it is as if both punishments were in prosecutions by the United States in its courts. \* \* \*

The [Eighteenth] Amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several states within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded.

In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal Constitution. This is the ratio decidendi of our decision in *Vigliotti v. Pennsylvania*, 258 U. S. 403.

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, *Barron v. Baltimore*, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of a different offense against the United States and so is not double jeopardy. \* \* \*

Counsel for defendants in error invokes the principle that, as between federal and state jurisdictions over the same prisoner, the one which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other. *Ponzi v. Fessenden*, 258 U. S. 254. This is beside the point and has no application. The effect of the ruling of the court below was to exclude the United States from jurisdiction to punish the defendants after the state court had exhausted its jurisdiction and when there was no conflict of jurisdiction.

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a state were to punish the manufacture, transportation and

sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.

Judgment reversed with direction to sustain the demurrer to the special plea in bar of the defendants and for further proceedings in conformity with this opinion.

#### NOTES

1. The guaranty of the Fifth Amendment that no person shall twice be put in jeopardy of life and limb for the same offense prevents an appeal from being taken by the government in a criminal prosecution in the federal courts, and a verdict of acquittal is therefore final. *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. 609 (1892); *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. 1192 (1896).

2. A rule similar to the one applied in the *Lanza* case to double jeopardy applies also to the guaranty of the Fifth Amendment against compulsory self-incrimination. In *United States v. Murdock*, 284 U. S. 141, 76 L. ed. 210, 52 Sup. Ct. 63, 82 A. L. R. 1376 (1931) it was held that a federal immunity statute is valid even though it affords no protection against prosecution under state law. This view was reaffirmed in *Feldman v. United States*, 322 U. S. 487, 88 L. ed. 1408, 64 Sup. Ct. 1082, 154 A. L. R. 982 (1944), where it was held that the privilege is not violated by permitting the use in evidence against a defendant of testimony given by him in state proceedings in which he has been compelled to testify as to those matters. Justices Black, Douglas and Rutledge dissented. Also, a state immunity statute is valid though it cannot prevent prosecution under federal laws nor the use in such prosecution of evidence obtained in the state court. *Jack v. Kansas*, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. 73 (1905).

3. The *Lanza* decision is criticised in Grant, *The Lanza Rule of Successive Prosecutions*, 32 Col. L. Rev. 1309 (1932), 2 *Selected Essays on Constitutional Law* (1938), 1375.

#### ERIE R. CO. v. TOMPKINS.

Supreme Court of the United States, 1938.

304 U. S. 64, 82 L. ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee

because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New York, which had jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of \$30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held, 90 F. 2d 603, 604, that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. \* \* \* Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. \* \* \* It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by § 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. § 725, which provides: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.

First. *Swift v. Tyson* [1842], 16 Pet. 1, 18, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be; and that, as there stated by Mr. Justice Story: “the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.”

The Court in applying the rule of § 34 to equity cases, in *Mason v. United States*, 260 U. S. 545, 559, said: “The statute, however, is merely declarative of the rule which would exist in the absence of the statute.” The federal courts assumed, in the broad field of “general law,” the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given § 34, and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U. S. 518. There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the com-

mon law of Kentucky, it was arranged that the Brown and Yellow re-incorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for western Kentucky to enjoin competition by the Black and White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift v. Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State, the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule. And, without even

change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another State, as was done in the *Taxicab* case.

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. \* \* \*

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203; 160 A. 859, the only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law. In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE REED.

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift v. Tyson*, and in the reasoning of the majority opinion except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

The "doctrine of *Swift v. Tyson*," as I understand it, is that the words "the laws," as used in § 34, line one, of the Federal Judiciary Act of September 24, 1789, do not include in their meaning "the decisions of the local tribunals." Mr. Justice Story, in deciding that point, said (16 Pet. 19): "Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

To decide the case now before us and to "disapprove" the doctrine of *Swift v. Tyson* requires only that we say that the words "the laws" include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing "unconstitutional" which required the overruling of *Swift v. Tyson*, for he said in the very opinion quoted by the majority, "I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmount Coal Co.*, but I would not allow it to spread the assumed dominion into new fields." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U. S. 518, 535. If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. *Wayman v. Southard*, 10 Wheat. 1. The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, dissent, p. 406, note 1. Compare *Read v. Bishop of Lincoln*, [1892] A. C. 644, 655; *London Street Tramways Co. v. London County Council*, [1898] A. C. 375, 379. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution. Cf. *United States v. Delaware & Hudson Co.*, 213 U. S. 366. \* \* \*

[MR. JUSTICE BUTLER delivered a dissenting opinion with which MR. JUSTICE McREYNOLDS concurred.]

### NOTES

1. In the event a state court changes the construction of its law before final disposition of a case in the federal courts, the latter courts must change their construction to conform with that of the state court. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 85 L. ed. 327, 61 Sup. Ct. 347 (1941); *Huddleston v. Dwyer*, 322 U. S. 232, 88 L. ed. 1246, 64 Sup. Ct. 1015 (1944).

2. What is the state law which must be followed by the federal courts? Is the doctrine of *Erie Railroad v. Tompkins* limited to the decisions of the highest state courts? If not, must the federal courts follow any state decision, no matter how inferior the court or how ill-reasoned the decision? In *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 237, 85 L. ed. 139, 61 Sup. Ct. 179, 132 A. L. R. 956 (1940) the court said: "Where an intermediate appellate court rests its considered judgment upon the rule of law it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Two other decisions handed down on the same day as the *West* case held that the opinions of intermediate state courts must be followed. In *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 85 L. ed. 109, 61 Sup. Ct. 176 (1940), the court held that a federal court had to follow decisions of the New Jersey court of chancery, a court having state-wide jurisdiction whose standing on the equity side was comparable to that of New Jersey's intermediate Appellate Courts on the law side. In *Six Companies of California v. Joint Highway District 13 of California*, 311 U. S. 180, 85 L. ed. 114, 61 Sup. Ct. 186 (1940) the court held that federal courts were bound to follow decisions of the district courts of appeal of California, and reversed a Circuit Court of Appeals decision which had failed to do so.

In *King v. Order of United Commercial Travelers of America*, 333 U. S. 153, 92 L. ed. 608, 68 Sup. Ct. 488 (1948) the court held that a federal court was not obliged to give effect to a decision of a South Carolina court of common pleas, a trial court for civil cases, which was the only state decision in point at the time. The court distinguished *Fidelity Union Trust Co. v. Field*. It further pointed out that its decision was not to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts.

3. In *Guaranty Trust Co. v. York*, 326 U. S. 99, 89 L. ed. 2079, 65 Sup. Ct. 1464, 160 A. L. R. 1231 (1945), in holding that the New York statute of limitations applied in an equitable proceeding in a federal court, where jurisdiction of the court rested upon diversity of citizenship, the Supreme Court said of the *Erie* case: "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." Is it not clear, however, that the rule of the *Erie* case should apply not only in diversity of citizenship cases, and other cases where the jurisdiction of the federal court exists solely because of the character of the parties, but also to cases where the federal court has jurisdiction because of a federal question but there is also an issue of state law in the case? Whenever the law of a state is the proper law governing any issue in a federal court, the reasoning of the *Erie* case would seem to make it the duty of the federal court to follow the decisions of the courts of that state.

This has been the rule of the Supreme Court in cases that start in state courts and come to the Supreme Court by appeal.

4. Note the present revised version (28 U. S. C. § 1652; F. C. A. 28 § 1652) of the Rules of Decision Act: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

5. Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, federal courts are not freed from the duty of deciding questions of state law in cases properly before them for decision merely because the law is undetermined or uncertain. *Meredith v. Winter Haven*, 320 U. S. 228, 88 L. ed. 9, 64 Sup. Ct. 7 (1943).

6. For informative discussions of various aspects of the rule of *Erie Railroad v. Tompkins*, see McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 Ill. L. Rev. 126 (1938); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267 (1946); Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A. B. A. J. 19 (1949); Horowitz, *Erie R. R. v. Tompkins—A Test To Determine Those Rules of State Law To Which Its Doctrine Applies*, 23 So. Cal. L. Rev. 204 (1950).

## TERRAL v. BURKE CONSTRUCTION CO.

Supreme Court of the United States, 1922.

257 U. S. 529, 66 L. ed. 352, 42 Sup. Ct. 188, 21 A. L. R. 186.

[An Arkansas statute provided for the revocation of a corporation's authority to carry on business in the state if the corporation removed to the federal courts any suit brought against it in the state courts, or instituted any suit against a citizen of the State in the federal courts. The Burke Construction Company, a Missouri corporation doing business in Arkansas, was granted an injunction against the revocation of its license by a United States District Court for the eastern district of Arkansas.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal from the District Court under section 238 of the Judicial Code in a case in which the law of a state is claimed to be in contravention of the Constitution of the United States. \* \* \*

The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the state because, while doing only a domestic business in the state, it resorts to the federal court sitting in the state.

The cases in this court in which the conflict between the power of a state to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the federal courts, has been considered, cannot be reconciled. They began with *Insurance Co. v. Morse*, 20 Wall. 445, which

was followed by *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Barron v. Burnside*, 121 U. S. 186; *Southern Pacific Co. v. Denton*, 146 U. S. 202; *Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 684; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246; *Herndon v. Chicago, Rock Island & Pac. Ry. Co.*, 218 U. S. 135; *Harrison v. St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, and *Donald v. Philadelphia & Reading Coal Co.*, 241 U. S. 329.

The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of *Doyle v. Continental Insurance Co.*, 94 U. S. 535, and *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is Affirmed.

#### NOTES

1. The shift to a new point of view, of which the above decision is one of the results, began in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. 190 (1910). There a foreign telegraph company had been permitted to enter the state without condition and had established extensive lines and numerous offices for both intrastate and interstate business. Many years later the state attempted to subject it to payment of a tax as a condition to its being permitted to continue to engage in intrastate business in the state. In holding that the state could not oust the corporation from its intrastate business for nonpayment of this tax, the court said that the tax was of a kind that both the commerce clause and the due process clause forbade the state to levy, and that the state could not use its power to impose conditions as a method of exacting payment of such a tax from a foreign corporation. Mr. Justice Harlan, for the court, said that the state could not require of the company that it should

"surrender rights belonging to it under the Constitution of the United States secured by that instrument against hostile state action" and that any such condition was "unconstitutional and void." Mr. Justice Holmes, whose dissent was concurred in by Mr. Chief Justice Fuller and Mr. Justice McKenna, said: "I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power. \* \* \* I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246. \* \* \*

2. For discussions of the development of the doctrine of unconstitutional conditions, see Merrill, *Unconstitutional Conditions*, 77 U. of Pa. L. Rev. 879 (1929), 1 *Selected Essays on Constitutional Law* (1938), 672; Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935), 1 *Selected Essays on Constitutional Law* (1938), 685.

### Section 3.—Interstate Privileges and Immunities of State Citizens.

#### CORFIELD v. CORYELL.

Circuit Court of the United States, 1825.

4 Wash. C. C. 371, Fed. Cas. No. 3,230.

This was an action of trespass for seizing \* \* \* a certain vessel, the property of the plaintiff. [The defendant justified by showing seizure in accordance with a statute of New Jersey, as follows:—"it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays or waters in this state, on board of any \* \* \* vessel, not wholly owned by some person, inhabitant of and actually residing in this state," under penalty of \$10 fine and forfeiture of the vessel. The plaintiff pleaded the invalidity of this statute under Art. IV, Sec. 2, Cl. 1 of the Constitution of the United States.]

WASHINGTON, J., delivered the opinion of the Court. \* \* \*

The next question is, whether this act infringes that section of the Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states"? The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to

enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or Constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the ex-

press permission of the sovereign who has the power to regulate its use. \* \* \*

Judgment for the defendant.

### NOTES

1. In accord with the principal case is *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248 (1877), holding that the planting of oysters in tidal waters within the state might be confined to citizens of the state. In *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. 600 (1896) a state statute was sustained which forbade the killing of wild game for transportation beyond the state. And in *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. 529, 14 Ann. Cas. 560 (1908) it was held that a state may forbid the drawing off of water from lakes or rivers wholly within the state to supply inhabitants of other states.

Considerable doubt has been cast recently upon the continued validity of the theory exemplified by the above decisions that the state holds certain common property in trust for its own citizens and therefore may deny access to all others. In *Toomer v. Witsell*, 334 U. S. 385, 92 L. ed. 1460, 68 Sup. Ct. 1157 (1948) the Supreme Court held that South Carolina may not, consistently with the interstate privileges and immunities clause, impose discriminatory license fees upon citizens of another state for the privilege of commercial shrimp fishing in the three-mile maritime belt off the South Carolina coast. The court said, through Mr. Chief Justice Vinson: "However satisfactorily the ownership theory explains the *McCready* case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. \* \* \* The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states. These considerations lead us to the conclusion that the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case." Justices Frankfurter and Jackson thought that the majority opinion had misapplied the privileges and immunities clause.

2. In *United States v. Wheeler*, 254 U. S. 281, 65 L. ed. 270, 41 Sup. Ct. 133 (1920), a judgment of a lower federal court was affirmed which had quashed an indictment against twenty-five defendants accused of conspiring, in violation of a federal statute, "to injure, oppress, threaten, or intimidate" certain citizens of the United States residing in Arizona of rights and privileges secured to them by the Constitution and laws of the United States, *i. e.*, the right to reside therein and to be immune from unlawful deportation from that state to another. Defendants were alleged to have kidnapped these persons and removed them from Arizona to New Mexico.

The court, through Mr. Chief Justice White, said: "Undoubtedly the right of citizens of the states to reside peacefully in, and to have free ingress into and egress from, the several states had, prior to the Confederation, a two-fold aspect: (1) as possessed in their own states and (2) as enjoyed in virtue of the comity of other states. But although the Constitution fused these distinct rights into one by providing that one state should not deny the citizens of other states rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one state in another of rights possessed in that state by its own citizens was a violation of a right afforded by the Constitution. This is the necessary result of Article IV, section 2, which reserves to the several states authority over the subject, limited by the restriction against state discriminatory action, hence excluding

federal authority except where invoked to enforce the limitation, which is not here the case; a conclusion expressly sustained by the ruling in *United States v. Harris*, 106 U. S. 629, 645, to the effect that the second section of Article IV, like the Fourteenth Amendment, is directed alone against state action."

### PAUL v. VIRGINIA.

Supreme Court of the United States, 1869.

8 Wall. 168, 19 L. ed. 357.

Error to the Supreme Court of Appeals of the State of Virginia.

[A Virginia statute required all insurance companies incorporated under any but its own laws to deposit with the treasurer of the state a large stated amount of bonds before doing business in the state and provided that no agent of any foreign insurance company should be licensed to represent it in the state unless such deposit were made. Any person acting as such agent without license was declared subject to a fine. Paul as agent for several New York insurance companies which had refused to make such deposits was refused a license but nevertheless undertook to act as agent for these companies in Virginia and issued a policy in Virginia on behalf of one of them to a citizen of Virginia. For this he was indicted and convicted. From an affirmance of this conviction he took this writ of error.]

MR. JUSTICE FIELD delivered the opinion of the Court.

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the states of the Union other than Virginia. And the business of insurance was then, and still is a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the state, and by insurance companies incorporated by the state, without a deposit of bonds, or a deposit of any kind with any officer of the commonwealth.

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution [Art. IV, § 2] which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several states." The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within

its meaning. The term "citizens" as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. \* \* \*

But in no case which has come under our observation, either in the state or federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. \* \* \*

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N. Y. 607.

Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or im-

plied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given.

Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Peters 519, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each state in other states the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the states. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states.

If the right asserted of the foreign corporation, when composed of citizens of one state, to transact business in other states were even restricted to such business as corporations of those states were author-

ized to transact, it would still follow that those states would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other states to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the state should be limited, that they should be required to give publicity to their transactions, to submit their affairs to proper examination, to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed and be liable to summary removal.

"It is impossible," to repeat the language of this court, in *Bank of Augusta v. Earle*, "upon any sound principle, to give such a construction to the article in question,"—a construction which would lead to results like these.

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. \* \* \* Issuing a policy of insurance is not a transaction of commerce. \* \* \*

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States, and the judgment of the Supreme Court of Appeals of that state must, therefore, be Affirmed.

#### NOTES

1. While a corporation is not a citizen under the interstate privileges and immunities clause, for jurisdictional purposes under Article III of the Constitution it is treated as a citizen of the state of its incorporation, thus bringing suits between it and the citizens of another state within the scope of the federal judicial power. This result has been accomplished by conclusively presuming that the members of a corporation are citizens of the state of its incorporation. *Bank of United States v. Deveaux*, 5 Cranch 61, 3 L. ed. 38 (1809); *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 11 L. ed. 353 (1844); *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. 621 (1896); *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. 526 (1898). See also, *McGovney*, A Supreme Court Fiction, 56 Harv. L. Rev. 853, 1090, 1225 (1943).

2. With respect to the holding in the principal case that "issuing a policy of insurance is not a transaction of commerce" it should be noted that in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 88 L. ed. 1440, 64 Sup. Ct. 1162 (1944) the Supreme Court reclassified the business of insurance as one coming within the regulatory power of Congress under the commerce clause and within the coverage of the Sherman Anti-Trust Act.

3. A business trust organized under the laws of a state and treated as an entity similar to a corporation by such state is not a citizen within the meaning

of the interstate privileges and immunities clause. *Hemphill v. Orloff*, 277 U. S. 537, 72 L. ed. 978, 48 Sup. Ct. 577 (1928).

### BLAKE v. McCLUNG.

Supreme Court of the United States, 1898.

172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165.

[On writ of error to the Supreme Court of Tennessee. The Embreeville Company, a corporation organized under the laws of the United Kingdom of Great Britain and Ireland for mining and manufacturing purposes complied in 1890 with the requirements of the statutes of Tennessee for doing business in that state and engaged in business therein. In 1893 McClung and other creditors, citizens of Tennessee, applied to a Tennessee court to appoint a receiver of the corporation's property in Tennessee, the corporation being insolvent. Other creditors intervened, among them Blake, a resident of and citizen of Ohio, the firm of Rogers, Brown & Company, the members of which were also residents of and citizens of Ohio, and the Hull Coal and Coke Company, a corporation organized under the laws of Virginia. There also were creditors who were residents of Great Britain. A Tennessee statute provided that the property of foreign mining and manufacturing corporations admitted to do business in the state should be liable for their debts and that "creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries." On issues involving priority among the creditors the case went on appeal to the Supreme Court of Tennessee which partly modifying the decree below decreed that all the creditors "who resided in the State of Tennessee" were entitled to priority over all of the other creditors whether residents of other states of the United States or of the Kingdom of Great Britain.]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

The suggestion is made that, as the statute refers only to "residents," there is no occasion to consider whether it is repugnant to the provision of the national Constitution relating to citizens. We cannot accede to this view. \* \* \* Looking at the purpose and scope of the Tennessee statute, it is plain that the words "residents of this state" refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto,—such residence as ascertained to or inhered in

citizenship. And the words, in the same statute, "residents of any other country or countries," refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other state or country. It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other states, but not to creditors who were citizens of such states. The state did not intend to place creditors, citizens of other states, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other states. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country. Any other interpretation of the statute would defeat the object for which it was enacted. \* \* \*

Beyond question, a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other states, and not citizens of the state in which such administration occurs? \* \* \*

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities," in Article IV of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the Court in *Conner v. Elliot*, 18 How. 591, 593, said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." \* \* \*

By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created

by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that state.

But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that, if the corporation became insolvent, its assets in Tennessee should first be applied to meet its obligations to residents of that state, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the Constitution, upon the ground that it withheld from citizens of other states, as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business, and having the power to contract with citizens residing in states other than the one in which it is located? \* \* \*

We hold such discrimination against citizens of other states to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with

the privileges and immunities granted or protected by the Constitution of the United States. \* \* \*

We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state, who becomes a resident thereof, shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established. \* \* \*

It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind, to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition of the

right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the state a fixed amount, to stand exclusively or primarily for the protection of its Tennessee creditors. \* \* \*

We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that state; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee. \* \* \*

[The Court held that the decree below was not invalid in so far as it adversely affected the Hull Coal and Coke Company, a Virginia corporation.]

MR. JUSTICE BREWER, with whom MR. CHIEF JUSTICE FULLER concurred, dissenting. \* \* \* Neither the statute, the pleadings nor the decree [below] raise any question of citizenship, or give any priority of right to the citizens of Tennessee over citizens of other states, but only discriminate between residents, and give residents of the state a priority. \* \* \* It is not necessary in this Court to refer to the difference between residence and citizenship. Neither is synonymous with the other, and neither includes the other. A British subject or a citizen of Ohio may be a resident of Tennessee, and entitled to the benefit of this statute. A citizen of Tennessee may, like these plaintiffs in error, be a resident of and doing business in Ohio and not entitled to its benefit. It will be time enough to consider the question discussed in the opinion when it appears that a state has attempted to discriminate between its own citizens and citizens of other states, and the courts of the state have affirmed the validity of such discrimination. \* \* \*

#### NOTE

1. As the principal case indicates, although the interstate privileges and immunities clause refers specifically to "citizens," the Supreme Court has frequently invalidated statutory discriminations against "nonresidents" on the ground that their practical effect is to deny equal privileges to citizens of other states. Thus, in holding that New York could not collect income taxes from "nonresi-

dents" which were assessed under a state statute allowing them lesser exemptions than it allowed residents in otherwise like circumstances, the court said: "Of course the terms 'resident' and 'citizen' are not synonymous, and in some cases the distinction is important (*La Tourette v. McMaster*, 248 U. S. 465, 470); but a general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled." *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 78-79, 64 L. ed. 460, 40 Sup. Ct. 228 (1920).

In *Chalker v. Birmingham & N. W. R. Co.*, 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. 366 (1919), the court held invalid a Tennessee occupation tax which provided for a \$100 tax on foreign construction companies (including partnerships and individuals) doing business in the state, while having their chief offices outside the state, and a \$25 tax on domestic construction companies having their chief offices in the state. The court said: "As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay. We can find no adequate basis for taxing individuals according to the location of their chief office—the classification, we think, is arbitrary and unreasonable. Under the federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them."

#### DOUGLAS v. NEW YORK, NEW HAVEN & HARTFORD R. CO.

Supreme Court of the United States, 1929.  
279 U. S. 377, 73 L. ed. 747, 49 Sup. Ct. 355.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit under the Employers' Liability Act for personal injuries. The injuries were inflicted in Connecticut, the plaintiff, the petitioner, is a citizen and resident of Connecticut, and the defendant, the respondent, is a Connecticut corporation, although doing business in New York where the suit was brought. Upon motion the trial court dismissed the action, assuming that the statutes of the State gave it a discretion in the matter, and its action was affirmed by the Appellate Division, 223 App. Div. 782, and by the Court of Appeals, 248 N. Y. 580. Thus it is established that the statute purports to give to the court the power that it exercised. But the plaintiff says that the Act as construed is void under Article IV, Section 2, of the Constitution of the United States: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." A subordinate argument is added that the jurisdiction is imposed by the Employers' Liability Act when as here the Court has authority to entertain the suit.

U. S. C., Title 45, § 56. Acts of April 22, 1908, c. 149, § 6, 35 Stat. 66, April 5, 1910, c. 143, § 1, 36 Stat. 291. That section gives concurrent jurisdiction to the courts of the United States and the States and forbids removal if the suit is brought in a State court.

The language of the New York statute, Laws of 1913, c. 60, amending § 1780 of the Code of Civil Procedure is: "An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only; \* \* \* 4. When a foreign corporation is doing business within this State." Laws of 1920, c. 916, § 47. The argument for the petitioner is that, construed as it is, it makes a discrimination between citizens of New York and citizens of other States, because it authorizes the court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York, which last it cannot do. *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152. It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States cannot unless they are actually living in the State. But however often the word "resident" may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship, there is nothing to prohibit the legislature from using "resident" in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality, we presume that the courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words. *Adams v. Penn Bank of Pittsburgh*, 35 Hun. 393. *Duquesne Club v. Penn Bank of Pittsburgh*, 35 Hun. 390. *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 324. *Klotz v. Angle*, 220 N. Y. 347, 358. See *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 562, 563. The same meaning seems to be assumed in *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152. We cannot presume, against this evidence and in order to overthrow a statute, that the courts of New York would adopt a different rule from that which is well settled here. *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 390.

Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between non-residents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence,

in *La Tourette v. McMaster*, 248 U. S. 465. Followed in *Maxwell v. Bugbee*, 250 U. S. 525, 539. It is true that in *Blake v. McClung*, 172 U. S. 239, 247, "residents" was taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, *ibid.*) it cannot prevail over the later decision in *La Tourette v. McMaster*, and the plain intimations of the New York cases to which we have referred. There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the courts concerned.

As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER dissent.

#### NOTE

1. In some cases statutes have been upheld which in terms discriminate between "residents" and "nonresidents" on the ground that the word "resident" as thus used in the statute does not mean permanent resident and that, since in the favored class there may be some citizens of other states who are temporarily "residing" in the state and in the disfavored class some citizens of the state temporarily "residing" out of the state, the statute does not discriminate between citizens of the state and citizens of other states. In other words, it is permissible to place "residents" and "nonresidents" into different categories if the term "resident" as used in the statute is not construed to mean "citizen." Thus, in *La Tourette v. McMaster*, 248 U. S. 465, 63 L. ed. 362, 39 Sup. Ct. 160 (1919), which involved the validity of a South Carolina statute which discriminated between "residents" and "nonresidents" in granting licenses to act as insurance brokers in the state, the Supreme Court of the United States accepted an interpretation of the above sort put upon the statute by the Supreme Court of South Carolina and concluded that, as so interpreted, the statute did not discriminate between citizens of the state and citizens of other states.

#### CANADIAN NORTHERN R. CO. v. EGGEN.

Supreme Court of the United States, 1920.

252 U. S. 553, 64 L. ed. 713, 40 Sup. Ct. 402.

MR. JUSTICE CLARKE delivered the opinion of the Court.

The only question presented for decision in this case is as to the validity of § 7709 of the statutes of Minnesota (General Statutes of Minnesota, 1913), which reads:

"When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

The Circuit Court of Appeals, reversing the District Court, held this statute invalid for the reason that the exemption in favor of citizens of Minnesota rendered it repugnant to Article IV, § 2, of the Constitution of the United States, which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The action was commenced in the District Court of the United States for the District of Minnesota, Second Division, by the respondent, a citizen of South Dakota, against the petitioner, a corporation organized under the laws of the Dominion of Canada, to recover damages for personal injuries sustained by him on November 29, 1913, when employed by the petitioner as a switchman in its yards at Humboldt, in the Province of Saskatchewan. The respondent, a citizen and resident of South Dakota, went to Canada and entered the employ of the petitioner as a switchman a short time prior to the accident complained of. He remained in Canada for six months after the accident and then returned to live in South Dakota. He commenced this action on October 15, 1915, almost two years after the date of the accident. By the laws of Canada, where the cause of action arose, an action of this kind must be commenced within one year from the time injury was sustained. If the statute of Minnesota, above quoted is valid, it is applicable to the action, which, being barred in Canada, cannot be maintained in Minnesota by a nonresident plaintiff. If, however, the statute is invalid, the general statute of limitations of Minnesota, allowing a period of six years within which to commence action, would be applicable. The record properly presents the claim of the petitioner that the Circuit Court of Appeals erred in holding the statute involved unconstitutional and void.

It is plain that the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against nonresidents of Minnesota. \* \* \*

It is only when the foreign limitation is shorter than that of Minnesota, and when the nonresident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign state (which happens to be the respondent's case), that inequality results—and for this we are asked to declare a statute unconstitutional which has been in force for sixty years.

This Court has never attempted to formulate a comprehensive list of the rights included within the "privileges and immunities" clause of the Constitution, Art. IV, Sec. 2, but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1823, in *Corfield v. Coryell*, 4 Wash. C. C. 371, 380 (the first federal case in which this clause was considered), saying: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*." *Slaughter-House Cases*, 16 Wall. 36, 76; *Blake v. McClung*, 172 U. S. 239, 248; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 155. In this *Corfield* case the court included in a partial list of such fundamental privileges, "The right of a citizen of one state, \* \* \* to institute and maintain actions of any kind in the courts of another."

The State of Minnesota, in the statute we are considering, recognized this right of citizens of other states to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect. \* \* \*

From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many States may be attached under conditions which would not justify the attaching of a resident citizen's property. \* \* \*

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection. This is the principle on which this Court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before

the new bar took effect. *Sohn v. Waterson*, 17 Wall. 596; *Terry v. Anderson*, 95 U. S. 628, 632; *Tennessee v. Sneed*, 96 U. S. 69, 74; *Antoni v. Greenhow*, 107 U. S. 769, 774. \* \* \*

The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year,—as long a time as was given him for that purpose by the laws under which he chose to live and work—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed. Reversed.

#### NOTES

1. *Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. 34 (1907) sustained as not violative of the interstate privileges and immunities clause a statute of Ohio which provided that whenever a citizen of that state was killed by wrongful act outside the state, in a jurisdiction which allowed an action therefor, the right of action could be enforced in Ohio. Here a widow sued in Ohio for the wrongful death of her husband (both being citizens of Pennsylvania), alleging it to have been caused in Pennsylvania by the negligence of the defendant. The Supreme Court of the United States affirmed a judgment of the Ohio Supreme Court which had reversed the lower Ohio court's judgment for the plaintiff. The court pointed out that the Pennsylvania statute which had created the right of action sought to be enforced in the Ohio courts had been construed by the Pennsylvania courts as creating a new cause of action, unknown to the common law, in favor of the survivor and not derived from the deceased. The widow had not been denied access to the Ohio courts because she was not a citizen of that state but because the cause of action which she presented was not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. "So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states which it allowed to its own." Justice Holmes concurred specially and Justices Harlan, White and McKenna dissented.

2. As the principal case emphasizes, the Supreme Court of the United States, following the lead of Mr. Justice Washington in *Corfield v. Coryell*, has interpreted the word "all" in the interstate privileges and immunities clause to mean "fundamental." Nor has the court undertaken to define with any further exactitude such privileges and immunities, preferring to decide each case in the light of its own facts and circumstances.

3. The interstate privileges and immunities clause (sometimes referred to as the "comity clause") is, of course, not the only anti-discrimination guaranty in the Constitution. Even if the words "citizens of each state" in that clause are authoritatively construed not to include "citizens" of the District of Columbia or of the territories, such persons nevertheless derived some immunity from discrimination by virtue of the equal protection clause of the Fourteenth Amend-

ment (which applies to "any person" and has been construed to protect corporations as well as natural persons) while they are *within a state's jurisdiction*. While this clause and Article IV, section 2, clause 1 to some extent overlap, they are not coextensive. It should be noted also that the commerce clause of the Constitution gives all persons, including corporations, immunity from state prevention of ingress for the conduct of interstate and foreign commerce within a state.

#### Section 4.—Other Interstate Relations.

##### KENTUCKY v. DENNISON.

Supreme Court of the United States, 1861.

24 How. 66, 16 L. ed. 717.

[Original proceeding by petition in the Supreme Court by the Governor in behalf of the State of Kentucky for a mandamus commanding Dennison, Governor of the State of Ohio, to deliver up Willis Lago, charged with being a fugitive from justice from Kentucky, where he had been indicted for violation of the fugitive slave law of that state. The Governor of Ohio, acting upon the legal advice of the Attorney-General of Ohio, refused to honor the requisition of the Governor of Kentucky, issued in accordance with an act of Congress of 1793, relating to interstate extradition. The refusal to deliver up Lago was based upon the ground that the crime for which he was indicted in Kentucky was unknown to the laws of Ohio, did not affect the public safety, was not regarded as *malum in se*, and hence did not come within the meaning of Article IV, Section 2 of the Constitution. The Attorney-General of Ohio, appearing in the proceedings, denied the jurisdiction of the Court to issue the writ.]

MR. CHIEF JUSTICE TANEY delivered the opinion of the Court. \* \* \*

[The Court first considered the question of jurisdiction and held that if the right claimed by Kentucky could be enforced by judicial process, the proceeding by mandamus was the only method by which the objective could be accomplished.]

This brings us to the examination of the clause of the Constitution [Art. IV, Sec. 2] which has given rise to the controversy. It is in the following words:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction.

The words, "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors," as well as treason and felony. \* \* \*

But as the word crime would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civil community, and that they do not extend to acts made offenses by local statutes growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the Attorney-General of that State. \* \* \*

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confederated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible that this compact engrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to "demand" implies that it is an absolute right, and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled. \* \* \*

It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress, and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested and delivered to the agent or authority of the State where the crime was committed. \* \* \*

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated, and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the executive authority of the State of Ohio.

The demand being thus made, the Act of Congress declares, that "it shall be the duty of the executive authority of the state" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact [the Constitution] created, when Congress had provided the mode of carrying it into execution. The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the General Government even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it, for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over state officers not warranted by the Constitution. But the General Government having in that law

fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the state authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the state to carry it into execution.

It is true that in the early days of the government, Congress relied with confidence upon the co-operation and support of the states, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. \* \* \*

But the language of the act of 1793 is very different. It does not purport to give authority to the executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the state authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the state executive to the compact entered into with the other states when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every state, for every state had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.

#### NOTES

1. The deficiencies of the interstate extradition clause, as construed in the principal case, have been partially remedied by the negotiation of compacts among the states and by uniform state legislation, as well as by federal legislation enacted under the commerce clause of the Constitution. The Fleeing Felon Act of 1934 (18 U. S. C. § 1073; F. C. A. 18 § 1073) makes it an offense against the United States to move or travel in interstate or foreign commerce by fleeing

from one state to another with intent to escape prosecution for a stated number of serious crimes or to avoid giving testimony in any criminal prosecution in which the commission of a felony is charged.

2. When the accused has come within the jurisdiction of the demanding state, he cannot secure release by habeas corpus in the federal courts on the ground that his removal to such state was illegal. *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. 40 (1892); *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. 111, 7 Ann. Cas. 1047 (1906). This is true even though the fugitive was forcibly kidnapped and returned to the demanding state by armed men acting without color of authority. *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. 1204 (1888).

3. A fugitive from justice, upon his return to the state from which he fled, may be tried not only for the offense for which his return was demanded, but also for any other offense against the laws of the demanding state. *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. 687 (1893).

### WEST VIRGINIA EX REL. DYER v. SIMS.

Supreme Court of the United States, 1951.

341 U. S. 22, 95 L. ed. 713, 71 Sup. Ct. 557.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

After extended negotiations eight states entered into a Compact to control pollution in the Ohio River system. See Ohio River Valley Water Sanitation Compact [July 11, 1940] 54 Stat. 752, ch. 581, 33 U. S. C. § 567a, note, Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia recognized that they were faced with one of the problems of government that are defined by natural rather than political boundaries. Accordingly, they pledged themselves to cooperate in maintaining waters in the Ohio River basin in a sanitary condition through the administrative mechanism of the Ohio River Valley Water Sanitation Commission, consisting of three members from each State and three representing the United States.

The heart of the Compact is Article VI. This provides that sewage discharged into boundary streams or streams flowing from one State into another "shall be so treated, within a time reasonable for the construction of the necessary works, as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent (45%) of the total suspended solids; provided that, in order to protect the public health or to preserve the waters for other legitimate purposes, \* \* \* in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, due notice and hearing." Industrial wastes are to be treated "to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing." \* \* \*

Article IX provides that the Commission may, after notice and hearing, issue orders for compliance enforceable in the State and federal courts. It further provides: "No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the Commissioners from such State."

By Article X the States also agree "to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory states. \* \* \*"

The present controversy arose because of conflicting views between officials of West Virginia regarding the responsibility of West Virginia under the Compact.

The Legislature of that State ratified and approved the Compact on March 11, 1939, W. Va. Acts 1939, ch. 38. Congress gave its consent on July 11, 1940, 54 Stat. 752, ch. 581, and upon adoption by all the signatory States the Compact was formally executed by the Governor of West Virginia on June 30, 1948. At its 1949 session the West Virginia Legislature appropriated \$12,250 as the State's contribution to the expenses of the Commission for the fiscal year beginning July 1, 1949. W. Va. Acts 1949, ch. 9, Item 93. Respondent Sims, the auditor of the State, refused to issue a warrant upon its treasury for payment of this appropriation. To compel him to issue it, the West Virginia Commissioners to the Compact Commission and the members of the West Virginia State Water Commission instituted this original mandamus proceeding in the Supreme Court of Appeals of West Virginia. The court denied relief on the merits and we brought the case here. 340 U. S. 807, ante, 19, 71 S. Ct. 51, because questions of obviously important public interest are raised.

The West Virginia court found that the "sole question" before it was the validity of the Act of 1939 approving West Virginia's adherence to the Compact. It found that Act invalid in that (1) the Compact was deemed to delegate West Virginia's police power to other States and to the Federal Government, and (2) it was deemed to bind future legislatures to make appropriations for the continued activities of the Sanitation Commission and thus to violate Art. 10, § 4 of the West Virginia Constitution.

Briefs filed on behalf of the United States and other States, as amici, invite the Court to consider far-reaching issues relating to the

Compact Clause of the United States Constitution. Art. 1, § 10, cl. 3. The United States urges that the Compact be so read as to allow any signatory State to withdraw from its obligations at any time. Pennsylvania, Ohio, Indiana, Illinois, Kentucky and New York contend that the Compact Clause precludes any State from limiting its power to enter into a compact to which Congress has consented. We must not be tempted by these inviting vistas. We need not go beyond the issues on which the West Virginia court found the Compact not binding on that State. That these are issues which give this Court jurisdiction to review the State court proceeding, 28 U. S. C. § 1257 [F. C. A. 28 § 1257], needs no discussion after *Delaware River Joint Toll Bridge Com. v. Colburn*, 310 U. S. 419, 427.

Control of pollution in interstate streams might, on occasion, be an appropriate subject for national legislation. Compare *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508. But, with prescience, the Framers left the States free to settle regional controversies in diverse ways. Solution of the problem underlying this case may be attempted directly by the affected States through contentious litigation before this Court. *Missouri v. Illinois*, 180 U. S. 208; *New York v. New Jersey*, 256 U. S. 296. Adjudication here of conflicting State interests affecting stream pollution does not rest upon the law of a particular State. This Court decides such controversies according to "principles it must have power to declare." *Missouri v. Illinois*, *supra* (200 U. S. at 519). But the delicacy of interstate relationships and the inherent limitations upon this Court's ability to deal with multifarious local problems have naturally led to exacting standards of judicial intervention and have inhibited the formulation of a code for dealing with such controversies. As Mr. Justice Holmes put it: "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side." *Missouri v. Illinois*, *supra* (200 U. S. at 521).

Indeed, so awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is "more likely to be wisely solved by coöperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." *New York v. New Jersey*, *supra* (256 U. S. at 313). The suggestion has had fruitful response.

The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of compacts. A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review. Not only was congressional consent required, as for all compacts; direct participation by the Federal Government was provided in the President's appointment of three members of the Compact Commission. Art. IV; Art. XI, § 3.

But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider v. La Plata River & C. Creek Ditch Co.* 304 U. S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another.

The Supreme Court of Appeals of the State of West Virginia is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution. But two prior decisions of this Court make clear that we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.

*Kentucky v. Indiana*, 281 U. S. 163, dealt with a compact to build a bridge across the Ohio River. In an original action brought before this Court, Indiana defended on the ground that she should not be compelled to perform until the Indiana courts decided, in a pending case,

whether her officials had been authorized to enter into the compact. Mr. Chief Justice Hughes, speaking for a unanimous Court, dismissed the argument: "Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights inter sese, and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. *Virginia v. West Virginia*, 11 Wall. 39, 56; 220 U. S. 1, 28. A decision in the present instance by the state court would not determine the controversy here." 281 U. S. at 176, 177.

In reaching this conclusion the Chief Justice could hardly avoid analogizing the situation to that where a question is raised whether a State has impaired the obligation of a contract. "It has frequently been held that when a question is suitably raised whether the law of a State has impaired the obligation of a contract, in violation of the constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislation of the State. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced. *Larson v. South Dakota*, 278 U. S. 429, 433, and cases there cited." 281 U. S. at 176.

*Hinderlider v. La Plata River & C. Creek Ditch Co.*, 304 U. S. 92, *supra*, is the second of these cases. It also makes clear, if authority be needed, that the fact the compact questions reach us on a writ of certiorari rather than by way of an original action brought by a State does not affect the power of this Court. In the *Hinderlider* Case, an action was brought in the Colorado courts to enjoin performance of a compact between Colorado and New Mexico concerning water rights in the La Plata River. The State court held that the compact was invalid because it affected appropriation rights guaranteed by the Colorado State Constitution. 101 Colo. 73, 70 P. 2d 849; see also 93 Colo. 128, 25 P. 2d 187. Mr. Justice Brandeis, speaking for a unanimous Court, held that the relative claims of New Mexico and Colorado citizens could be determined by compact and reversed the decision of the State court.

The issue in the *Hinderlider* Case was whether the Colorado legislature had authority, under the State Constitution, to enter into a compact which affected the water rights of her citizens. The issue before us is whether the West Virginia legislature had authority, under her con-

stitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency.

That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved because it is to a body outside the State and because its legislature may not be free, at any time, to withdraw the power delegated. We are not here concerned, and so need not deal, with specific language in a State Constitution requiring that the State settle its problems with other States without delegating power to an interstate agency. What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. If this Court, in the exercise of its original jurisdiction, were to enter a decree requiring West Virginia to abate pollution of interstate streams, that decree would bind the State. The West Virginia Legislature would have no part in determining the State's obligation. The State Legislature could not alter it; it could not disregard it, as West Virginia on another occasion so creditably recognized. The obligation would be fixed by this Court on the basis of a master's report. Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. The Compact involves a reasonable and carefully limited delegation of power to an interstate agency. Nothing in its Constitution suggests that, in dealing with the problem dealt with by the Compact, West Virginia must wait for the answer to be dictated by this Court after harassing and unsatisfactory litigation. \* \* \*

The State court also held that the Compact is in conflict with Art. 10, § 4, of the State Constitution and for that reason is not binding in West Virginia. This section provides:

"No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

The Compact was evidently drawn with great care to meet the problem of debt limitation in light of this section and similar restrictive provisions in the constitutions of other States. Although, under Art. X,

of the Compact, the States agree to appropriate funds for administrative expenses the annual budget must be approved by the Governors of the signatory States. In addition, Article V provides: "The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." In view of these provisions, we conclude that the obligation of the State under the Compact is not in conflict with Art. 10, § 4 of the State Constitution.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE REED, concurring.

MR. JUSTICE REED concurs in the judgment of the Court but disagrees with the assertion of power by this Court to interpret the meaning of the West Virginia Constitution. This Court must accept the State court's interpretation of its own Constitution unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule.

There is no problem concerning the binding effect upon this Court of state court interpretation of state law, under the Compact Clause such as there is under the clause against impairing the Obligation of Contracts. Under the latter clause, this Court, in order to determine whether the subsequent state law, constitutional or statutory, impairs the federal prohibition against impairment of contracts, has asserted power to construe for itself the disputed agreement, to decide whether it is a contract, and to interpret the subsequent state statute to decide whether it impairs that contract. Even then we accept state court conclusions unless "manifestly wrong." Examination here, under the Contract Clause, is to enforce the federal provision against impairment and is made only to decide whether under the Contract Clause there is a contract and whether it is impaired. This Court thus adjudges whether state action has violated the Federal Contract Clause. It does not decide the meaning of a state statute as applied to a state appropriation.

Under the Compact Clause, however, the federal questions are the execution, validity and meaning of federally approved state compacts. The interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause and not by any implied federal power to construe state law.

West Virginia adjudges her execution of the compact is invalid as a delegation of state police power and as a creation of debt beyond her constitutional powers. Since the Constitution provided the compact

for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action.

This, I think, was the basis of our holding in *Hinderlider v. La Plata River & C. Creek Ditch Co.* 304 U. S. 92. \* \* \*

I would uphold the validity of the compact and reverse the judgment of West Virginia refusing mandamus, with direction to that court to enter a judgment not inconsistent with an opinion based upon the Supremacy Clause.

MR. JUSTICE JACKSON, concurring.

West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact by reading into her Constitution a limitation upon the powers of her Governor and Legislature to contract.

West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation. The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court.

West Virginia points to no provision of her Constitution which we can say was clear notice or fair warning to Congress or other States of any defect in her authority to enter into this Compact. \* \* \*

Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act. For this reason, I consider that whatever interpretation she may put on the generalities of her Constitution, she is bound by the Compact, and on that basis I concur in the judgment.

#### NOTES

1. The Constitution provides that "no state shall enter into any treaty, alliance or confederation" (Art. I, § 10, cl. 1) and that "no state shall, without the consent of Congress, \* \* \* enter into any agreement or compact with another state or with a foreign power" (Art. I, § 10, cl. 3). The required consent of Congress to interstate agreements need not be given in express terms or with any particular formalities; it is sufficient if Congress by some positive act indicate its assent. For example, the admission by Congress of Kentucky as a state amounted to an assent to an agreement between Kentucky and Virginia by which the former was detached from the territory of the latter. *Green v. Biddle*, 8 Wheat. 1, 85, 5 L. ed. 547 (1823). The compact clause permits agreements between states which do not have a substantial tendency to increase the political power or influence of one or more of the states involved. Thus the clause prevents a compact by which the territory of one state is substantially increased, but does

not prevent an agreement in good faith entered into in order to settle a boundary dispute. *Virginia v. Tennessee*, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. 728 (1893). Other examples of permissible compacts between states are those relating to the control and improvement of navigation, apportionment of water rights in interstate rivers and conservation of natural resources, and the regulation of public utilities. An especially noteworthy recent instance of this form of "cooperative federalism" is the compact entered into in 1921 between New York and New Jersey creating the Port of New York District and establishing the Port of New York Authority, for the comprehensive development and governance of the port.

2. For discussions of the compact clause see Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *Yale L. J.* 685 (1925), 3 *Selected Essays on Constitutional Law* (1938), 1606; Note, *Regional Education: A New Use of the Interstate Compact?*, 34 *Va. L. Rev.* 64 (1948). The principal case is discussed in Comment, 4 *Stanf. L. Rev.* 138 (1951).

3. Another important provision of the Constitution dealing with relations between the states is the full faith and credit clause (Art. IV, § 1) which provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Since cases arising under this clause are customarily dealt with in the course on Conflict of Laws, the subject is omitted from consideration in this case-book. The importance of the role of the Supreme Court as the arbiter of controversies among two or more states which are susceptible of judicial determination (Art. III, § 2, cl. 1) is exemplified by the opinion in *Kansas v. Colorado*, *supra*.

## CHAPTER IV

### NATIONALITY AND CITIZENSHIP

#### Section 1.—Citizenship by Birth and Naturalization.

##### UNITED STATES v. WONG KIM ARK.

Supreme Court of the United States, 1898.  
169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. 456.

[Wong Kim Ark was born in San Francisco in 1873 of Chinese parents who were subjects of the Emperor of China but were permanently domiciled in the United States. He went to China in 1894 and upon his return in 1895 the collector of customs in San Francisco refused him permission to enter on the ground that he was a Chinese laborer, not a citizen, and not within any of the privileged classes named in the Chinese Exclusion Acts then in force in the United States. Being restrained of his liberty for the purpose of deportation, he sued out a writ of habeas corpus, claiming American citizenship on the ground of birth. The United States district court ordered Wong Kim Ark to be discharged and the United States appealed.]

MR. JUSTICE GRAY delivered the opinion of the Court. \* \* \*

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." \* \* \*

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd v. United States*, 116 U. S. 616, 624, 625; *Smith v. Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore v. United States*, 91 U. S. 270, 274. \* \* \*

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the Kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's domains, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.  
\* \* \*

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. \* \* \*

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations. \* \* \* [The Court here considered the laws of several European countries with respect to citizenship and found that they materially differed.]

There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled or definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship. \* \* \*

Passing by questions once earnestly controverted, but finally put at rest by the Fourteenth Amendment of the Constitution, it is beyond doubt that, before the enactment of the Civil Rights Act of 1866, or the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the forefront, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms. \* \* \*

The first section of the Fourteenth Amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears upon the face of the Amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens

according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this Court, to establish the citizenship of free negroes which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford* (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *Slaughter-House Cases* (1873), 16 Wall. 36, 73; *Strauder v. West Virginia* (1879), 100 U. S. 303, 306; *Ex parte Virginia* (1879), 100 U. S. 339, 345; *Neal v. Delaware* (1880), 103 U. S. 370, 386; *Elk v. Wilkins* (1884), 112 U. S. 94, 101. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in the *Slaughter-House Cases*, above cited. \* \* \*

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. \* \* \*

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the Fourteenth Amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship. \* \* \*

This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization. \* \* \*

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and protection, and consequently subject to the jurisdiction, of the United States.

\* \* \*

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can restrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. \* \* \*

The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United

States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." *Osborn v. United States Bank*, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States." \* \* \*

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that *the question must be answered in the affirmative.*

Order affirmed.

[MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, dissented in an opinion which is omitted.]

#### NOTES

1. Modern systems of law recognize the concepts of "nationality" and "alienage." The term "nationals" applies to persons who owe permanent allegiance to a country but who nevertheless may not be citizens thereof. In the law of the United States, nationals are divided into two classes: (1) citizen-nationals, and (2) non-citizen-nationals. Thus, while not all nationals of the United States are citizens thereof, all citizens of the United States are its nationals. An alien, on the other hand, is a person who is not a national.

In *Dred Scott v. Sandford*, 19 How. 393, 15 L. ed. 691 (1857), Chief Justice Taney in a dictum concurred in by Justices Wayne and Daniel declared that free Negroes born in the United States were not citizens of the United States, although he said they owed allegiance to the United States. Justice Curtis thought that a Negro born in a state by the law of which he was a state citizen was also a citizen of the United States, but he admitted that Negroes born in states of the Union by the laws of which they were not state citizens were not citizens of the United States. Together these four justices thought that all or some Negroes born in the United States were not citizens thereof. If they owed allegiance but were not citizens, their status must have been that of non-citizen nationals.

In *Elk v. Wilkin*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. 41 (1884), the Supreme Court held that the Fourteenth Amendment did not confer citizenship upon Indians born in the United States whose parents were members of any Indian tribe which still existed as a tribe, since the Indians were not born "subject to the jurisdiction" of the United States. (The decision was subsequently nullified by legislation conferring national citizenship on all Indians born within the United States.) Although the court did not say that such Indians were not aliens, the preponderating opinion seems to be that they were not. If they were

not aliens, they necessarily were nationals; and if not citizens, they were non-citizen nationals.

2. In *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. 177 (1904) it was held that a native-born Porto Rican was not an alien. Congress has by statute conferred United States citizenship on the inhabitants of Porto Rico, the Canal Zone, Alaska, Hawaii, the Virgin Islands and Guam. See 8 U. S. C. §§ 1402-1407; F. C. A. 8 §§ 1402-1407. For a listing of those persons who are nationals but not citizens of the United States at birth, see 8 U. S. C. § 1408; F. C. A. 8 § 1408.

3. The Constitution (Art. I, § 8, cl. 4) gives to Congress the power "to establish an uniform rule of naturalization." The statutes relating to naturalization are important but form no part of a course in constitutional law. Because of its nature the power is an exclusive federal power. *Chirac v. Chirac*, 2 Wheat. 259, 4 L. ed. 234 (1817). State courts, however, may be authorized by Congress to administer federal naturalization statutes. *Holmgren v. United States*, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. 588, 19 Ann. Cas. 778 (1910).

4. In *United States v. Schwimmer*, 279 U. S. 644, 73 L. ed. 889, 49 Sup. Ct. 448 (1929) the Supreme Court (Justices Holmes, Brandeis and Sanford dissenting) denied naturalization to a 49 year old Hungarian woman who made no objection to taking the oath of loyalty but would not promise to bear arms personally in the event of war. *United States v. Macintosh*, 283 U. S. 605, 75 L. ed. 1302, 51 Sup. Ct. 570 (1931) affirmed a decree of a district court (which had been reversed by the Circuit Court of Appeals) denying naturalization to a minister and professor in the Yale University Divinity School, born in Canada, who testified that he would have to believe that a war was "morally justified" before he would take up arms in it. Chief Justice Hughes dissented, joined by Justices Holmes, Brandeis and Stone. In *United States v. Bland*, 283 U. S. 636, 75 L. ed. 1319, 51 Sup. Ct. 569 (1931) the petitioner, a native of Canada who had been a nurse on the battlefields of France, was likewise denied citizenship because she was unwilling to bear arms. She refused to take the oath of allegiance except with the written interpolation of the words, "as far as my conscience as a Christian will allow." The same four justices dissented. These three cases were overruled in *Girouard v. United States*, 328 U. S. 61, 90 L. ed. 1084, 66 Sup. Ct. 826 (1946). *Girouard*, a native of Canada, was a Seventh Day Adventist who was willing to take the oath of allegiance and to serve in a non-combatant position in the Army, but not to bear arms. He said: "It is purely a religious matter with me, I have no political or personal reasons other than that." The court held that he was entitled to be naturalized. Chief Justice Stone, joined by Justices Reed and Frankfurter, dissented on the ground that Congress, by failing to amend the naturalization statute following the earlier decisions, had in effect adopted the views therein expressed. The dissent said: "It is not the function of this Court to disregard the will of Congress in the exercise of its Constitutional power."

5. Detailed rules governing the acquisition of citizenship in the United States are set forth in the Immigration and Nationality Act of 1952 (popularly known as the McCarran-Walter Act), 8 U. S. C. § 1101 *et seq.*; F. C. A. 8 § 1101 *et seq.*, which represents a revision, recodification, and consolidation of the many provisions on immigration, naturalization, etc., contained in several prior independent acts, all of which were repealed and superseded by the 1952 law.

6. The Supreme Court has held that a statute under which a native-born woman citizen of the United States acquired upon marriage the citizenship of her husband was valid, even as applied to a woman who married a resident alien and continued to reside within the United States. *Mackenzie v. Hare*, 239 U. S. 299, 60 L. ed. 297, 36 Sup. Ct. 106, Ann. Cas. 1916E, 645 (1915). The statute was subsequently repealed. Statutory rules governing the loss of nationality are set out in 8 U. S. C. §§ 1481-1489; F. C. A. 8 §§ 1481-1489.

7. The order admitting a naturalized person to citizenship and the certificate of naturalization may be set aside and canceled in a proceeding for this purpose brought by the United States in the federal courts on the ground that such order and certificate were procured by concealment of a material fact or by willful misrepresentation. 8 U. S. C. § 1451; F. C. A. 8 § 1451. The case which follows was a proceeding brought under this statute.

### KNAUER v. UNITED STATES.

Supreme Court of the United States, 1946.  
328 U. S. 654, 90 L. ed. 1500, 66 Sup. Ct. 1304.

MR JUSTICE DOUGLAS delivered the opinion of the Court.

Knauer is a native of Germany. He arrived in this country in 1925 at the age of 30. He had served in the German army during World War I and was decorated. He had studied law and economics in Germany. He settled in Milwaukee, Wisconsin, and conducted an insurance business there. He filed his declaration of intention to become a citizen in 1929 and his petition for naturalization in 1936. He took his oath of allegiance and was admitted to citizenship on April 13, 1937. In 1943 the United States instituted proceedings under § 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. § 738(a) [F. C. A. 8 § 738(a)], to cancel his certificate of naturalization on the ground that it had been secured by fraud in that (1) he had falsely and fraudulently represented in his petition that he was attached to the principles of the Constitution and (2) he had taken a false oath of allegiance. The District Court was satisfied beyond a reasonable doubt that Knauer practiced fraud when he obtained his certificate of naturalization. It found that he had not been and is not attached to the principles of the Constitution and that he took a false oath of allegiance. It accordingly entered an order cancelling his certificate and revoking the order admitting him to citizenship. The Circuit Court of Appeals affirmed. The case is here on a petition for a writ of certiorari which we granted to examine that ruling in light of our decisions in *Schneiderman v. United States*, 320 U. S. 118, and *Baumgartner v. United States*, 322 U. S. 665.

In the oath of allegiance which Knauer took he swore that he would "absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the German Reich," that he would support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"; that he would "bear true faith and allegiance to the same" and that he took "this obligation freely without any mental reservation or purpose of evasion." The first and crucial issue in the case is whether Knauer swore falsely and committed a fraud when he promised under oath to forswear allegiance to the German Reich and to transfer his allegiance to this nation.

Fraud connotes perjury, falsification, concealment, misrepresentation. When denaturalization is sought on this (*Baumgartner v. United States*, *supra*) as well as on other grounds (*Schneiderman v. United States*, *supra*), the standard of proof required is strict. We do not accept even concurrent findings of two lower courts as conclusive. *Baumgartner v. United States*, *supra*, 322 U. S. at pages 670, 671. We reexamine the facts to determine whether the United States has carried its burden of proving by "clear, unequivocal, and convincing" evidence, which does not leave "the issue in doubt," that the citizen who is sought to be restored to the status of an alien obtained his naturalization certificate illegally. *Schneiderman v. United States*, *supra*, 320 U. S. at page 158.

That strict test is necessary for several reasons. Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country "save that of eligibility to the Presidency." *Luria v. United States*, 231 U. S. 9, 22. There are other exceptions of a limited character. But it is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government. Great tolerance and caution are necessary lest good faith exercise of the rights of citizenship be turned against the naturalized citizen and be used to deprive him of the cherished status. Ill-tempered expressions, extreme views, even the promotion of ideas which run counter to our American ideals, are not to be given disloyal connotations in absence of solid, convincing evidence that that is their significance. Any other course would run counter to our traditions and make denaturalization proceedings the ready instrument for political persecutions. As stated in *Schneiderman v. United States*, *supra*, 320 U. S. at page 159, "Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times."

These are extremely serious problems. They involve not only fundamental principles of our political system designed for the protection of minorities and majorities alike. They also involve tremendously high stakes for the individual. For denaturalization, like deportation, may result in the loss "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U. S. 276, 284. Hence, where the fate of a human being is at stake, we must not leave the presence of his evil purpose to conjecture. *Cf. Bridges v. Wixon*, 326 U. S. 135, 149. Furthermore, we are dealing in cases of this kind with questions of intent. Here it is whether Knauer swore falsely on April 13, 1937. Intent is a subjective state, illusory and difficult to establish in absence of

voluntary confession. What may appear objectively to be false may still fall short of establishing an intentional misrepresentation which is necessary in order to prove that the oath was perjurious. And as *Baumgartner v. United States*, *supra*, indicates, utterances made in years subsequent to the oath are not readily to be charged against the state of mind existing when the oath was administered. 322 U. S. at page 675. Troubled times and the emotions of the hour may elicit expressions of sympathy for old acquaintances and relatives across the waters. "Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth." *Baumgartner v. United States*, *supra*, 322 U. S. at page 674. Human ties are not easily broken. Old social or cultural loyalties may still exist, though basic allegiance is transferred here. The fundamental question is whether the new citizen still takes his orders from, or owes his allegiance to, a foreign chancellory. Far more is required to establish that fact than a showing that social and cultural ties remain. And even political utterances, which might be some evidence of a false oath if they clustered around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization.

We have read with care the voluminous record in this case. We have considered the evidence which antedates Knauer's naturalization, (April 13, 1937), the evidence which clusters around that date, and that which follows it. We have considered Knauer's versions of the various episodes and the versions advanced by the several witnesses for the United States. We have considered the testimony and other evidence offered by each in corroboration or impeachment of the other's case. We have considered the appraisal of the veracity of the witnesses by the judge who saw and heard them and have given it that "due regard" required by the Federal Rules of Civil Procedure, rule 52(a). We conclude with the District Court and the Circuit Court of Appeals that there is solid, convincing evidence that Knauer before the date of his naturalization, at that time, and subsequent was a thorough-going Nazi and a faithful follower of Adolph Hitler. The conclusion is irresistible, therefore, that when he forswore allegiance to the German Reich he swore falsely. The character of the evidence, the veracity of the witnesses against Knauer as determined by the District Court, the corroboration of challenged evidence presented by the government, the consistent pattern of Knauer's conduct before and after naturalization convince us that the two lower courts were correct in their conclusions. The standard of proof, not satisfied in either the *Schneiderman* or *Baumgartner* cases, is therefore plainly met here.

We will review briefly what we, as well as the two lower courts, accept as the true version of the facts. [The Court's review of the facts is omitted.]

We have given merely the highlights of the evidence. Much corroborative detail could be added. But what we have related presents the gist of the case against Knauer. If isolated parts of the evidence against Knauer were separately considered, they might well carry different inferences. His alertness to rise to the defense of Germans or of Americans of German descent could well reflect, if standing as isolated instances, attempts to protect a minority against what he deemed oppressive practices. Social and cultural ties might be complete and adequate explanations. Even utterances of a political nature which reflected tolerance or approval of the Nazi program in Germany might carry no sinister connotation, if they were considered by themselves. For many native-borns in this country did not awaken to the full implications of the Nazi program until war came to us. \* \* \*

But we have here much more than political utterances, much more than a crusade for the protection of minorities. This record portrays a program of action to further Hitler's cause in this nation—a program of infiltration which conforms to the pattern adopted by the Nazis in country after country. The ties with the German Reich were too intimate, the pattern of conduct too consistent, the overt acts too plain for us to conclude that Knauer was merely exercising his right of free speech either to spread tolerance in this country or to advocate changes here.

Moreover, the case against Knauer is not constructed solely from his activities subsequent to April 13, 1937—the date of his naturalization. The evidence prior to his naturalization, that which clusters around that date, and that which follows in the next few years is completely consistent. It conforms to the same pattern. We do not have to guess whether subsequent to naturalization he had a change of heart and threw himself wholeheartedly into a new cause. We have clear, convincing, and solid evidence that at all relevant times he was a thorough-going Nazi bent on sponsoring Hitler's cause here. And this case, unlike the Baumgartner case, is not complicated by the fact that when the alien took his oath Hitler was not in power. On April 13, 1937, Hitler was in full command. The evidence is most convincing that at that time, as well as later, Knauer's loyalty ran to him, not to this country.

The District Court properly ruled that membership in the Bund was not in itself sufficient to prove fraud which would warrant revocation of a decree of naturalization. Otherwise, guilt would rest on implication, contrary to the rule of the Schneiderman and Baumgartner cases. But we have here much more than that. We have a clear course of conduct, of which membership in the Bund was a manifestation,

designed to promote the Nazi cause in this country. This is not a case of an underling caught up in the enthusiasm of a movement, driven by ties of blood and old associations to extreme attitudes, and perhaps unaware of the conflict of allegiance implicit in his actions. Knauer is an astute person. He is a leader—the dominating figure in the cause he sponsored, a leading voice in the councils of the Bund, the spokesman in the program for systematic agitation of Nazi views. His activities portray a shrewd, calculating, and vigilant promotion of an alien cause. The conclusion seems to us plain that when Knauer forswore allegiance to Hitler and the German Reich he swore falsely.

\* \* \*

Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court. We have recently considered the broad powers of equity to set aside a decree for fraud practiced on the court which granted it. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238. The present suit is an equity suit. *Luria v. United States*, *supra*, 231 U. S. at pages 27, 28. But we need not consider in this case what the historic powers of equity might be in this situation. For Congress has provided that fraud is a basis for cancellation of certificates of naturalization in proceedings instituted by the United States. The legislative history of that enactment shows that false swearing was one of the evils included in the statutory grounds for denaturalization. That power was granted to give added protection against fraud committed on the naturalization courts. *United States v. Ness*, 245 U. S. 319, 324, 327. Cancellation of a certificate on the grounds of fraud includes cancellation for falsely swearing that the applicant forswore allegiance to his native country. Though the making of a false oath be called intrinsic fraud (see *United States v. Throckmorton*, 98 U. S. 61, *supra*), it is within the reach of the statute.

We have no doubt of the power of Congress to provide for denaturalization on the grounds of fraud. The Constitution grants Congress power "To establish an uniform Rule of Naturalization." Article I, § 8. The power of denaturalization comes from that provision and the "necessary and proper" clause in Article I, § 8. See *Tutun v. United States*, 270 U. S. 568, 578. We do not have here a case where, after an alien has been naturalized, Congress provides new grounds which are invoked for cancellation of his certificate. Fraud—the basis of revocation with which we are now concerned—was a statutory ground for denaturalization when Knauer took his oath. Moreover, we are not faced with the question of what limits there may be to conditions for denaturalization which Congress may provide. A certificate obtained by fraud is clearly within the reach of

Congressional power. \* \* \* To hold otherwise would be an anomaly. It would in effect mean that where a person through concealment, misrepresentation or deceit perpetrated a fraud on the naturalization court, the United States would be remediless to correct the wrong. That would indeed put a premium on the successful perpetration of frauds against the nation. We cannot conclude that Congress, which may withhold the right of naturalization (*Tutun v. United States*, supra, 270 U. S. at page 578), is so powerless. We adhere to the prior rulings of this Court that Congress may provide for the cancellation of certificates of naturalization on the grounds of fraud in their procurement and thus protect the courts and the nation against practices of aliens who by deceitful methods obtain the cherished status of citizenship here, the better to serve a foreign master. \* \* \*

Affirmed.

[MR. JUSTICE JACKSON took no part in the consideration or decision of this case. MR. JUSTICE BLACK concurred specially. MR. JUSTICE RUTLEDGE, joined by MR. JUSTICE MURPHY, wrote a dissenting opinion which contained the following statement: "In my opinion the power to naturalize is not the power to denaturalize. The act of admission must be taken as final, for any cause which may have existed at that time. Otherwise there cannot but be two classes of citizens, one free and secure except for acts amounting to forfeiture within our tradition; the other conditional, timorous and insecure because blanketed with the threat that some act or conduct, not amounting to forfeiture for others, will be taken retrospectively to show that some prescribed condition had not been fulfilled and be so adjudged. I do not think such a difference was contemplated when Congress was authorized to provide for naturalization and the terms on which it should be granted."]

#### NOTES

1. The opinion in the *Knauer* case refers to *Schneiderman v. United States*, 320 U. S. 118, 87 L. ed. 1796, 63 Sup. Ct. 1333 (1943) and *Baumgartner v. United States*, 322 U. S. 665, 88 L. ed. 1525, 64 Sup. Ct. 1240 (1944). In the *Schneiderman* case the United States brought suit in 1939 to cancel a certificate of citizenship awarded to defendant in 1927 on the ground of illegal procurement. Evidence was introduced to show that at the time of naturalization and for five years preceding, defendant was not attached to the principles of the Constitution in that he was a member of, and supported the doctrines of, the Communist Party and advocated the overthrow of the government by force and violence. The Supreme Court reversed the judgment of the lower court, which had set aside the certificate, on the ground that the government had failed to sustain the burden of proof by introducing "clear, unequivocal and convincing" evidence justifying such action. Chief Justice Stone, joined by Justices Roberts and Frankfurter, dissented. In the *Baumgartner* case the government sought in 1942 to set aside the naturalization decree granted to defendant, a native of Germany, in 1932. Evidence was adduced to show *Baumgartner's* admiration for the principles of Nazism and his devotion to Hitler. When defendant had renounced his allegiance to Germany it was still a republic; Hitler's later acquisi-

tion of power was greeted by defendant with enthusiasm. The Supreme Court, by a unanimous vote, reversed the judgment of the lower court on the ground of insufficiency of evidence. The opinion pointed out that evidence as to Baumgartner's attitude after 1932 afforded insufficient proof that in that year he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country.

2. For a case in which the Supreme Court held that a judgment by default rendered against petitioner in a denaturalization proceeding should be reopened and a hearing on the merits granted, see *Klapprott v. United States*, 335 U. S. 601, 93 L. ed. 266, 69 Sup. Ct. 384 (1949).

3. In *Blackmer v. United States*, 284 U. S. 421, 76 L. ed. 375, 52 Sup. Ct. 252 (1932) the Supreme Court affirmed a decree of the Supreme Court of the District of Columbia adjudging Blackmer, a citizen of the United States resident in France, guilty of contempt of that court for failure to respond to subpoenas served upon him in France and requiring him to appear as a witness on behalf of the United States at a criminal trial. The proceedings before the Supreme Court involved the satisfaction of a fine and costs out of property of Blackmer seized within the United States by order of the court. The court, through Mr. Chief Justice Hughes, said: "While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of his obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook v. Tait*, 265 U. S. 47, 54, 56. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. *United States v. Bowman*, 260 U. S. 94, 102. With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power."

## Section 2.—The Power Over Aliens.

### FONG YUE TING v. UNITED STATES.

Supreme Court of the United States, 1893.  
149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. 1016.

[Appeals from the Circuit Court of the United States for the southern district of New York. A federal statute of May 5, 1892 required Chinese laborers within the limits of the United States at the time of the passage of the act to take out certificates of residence. Those who neglected to do so within one year without good cause were made liable to deportation, after proceedings before certain executive officers. These were three writs of habeas corpus granted by the Circuit Court, upon petition of Fong Yue Ting and two others, arrested and held by the marshal of the district for not having complied with the provisions of the act. In each case the court, after a hearing upon the writ of habeas corpus and the return of the marshal,

dismissed the writ and allowed an appeal of the petitioner to the Supreme Court, admitting him to bail pending the appeal.]

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the Court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this Court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu v. United States*, 142 U. S. 651, 659, the Court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping v. United States*, 130 U. S. 581, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the Court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in *Knox v. Lee*, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the State governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but

for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The Court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers.

\* \* \*

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. \* \* \*

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States. \* \* \*

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene. \* \* \*

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which the alien's right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides. \* \* \*

Sections 6 and 7 of the act of 1892 are the only sections which have any bearing on the cases before us, and the only ones, therefore, the construction or effect of which need now to be considered. The manifest objects of these sections are to provide a system of registration and identification of such Chinese laborers, to require them to obtain certificates of residence, and if they do not do so within a year, to have them deported from the United States. \* \* \*

For the reasons stated in the earlier part of this opinion, Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this.

The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after an opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States, that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of Congress, can have a material bearing upon the question whether he shall be sent out of the country, or be permitted to remain. \* \* \*

The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property without due process of law; and the provisions of the Constitution securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

\* \* \*

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of this Court, is that in each of these cases the judgment of the Circuit Court, dismissing the writ of habeas corpus, is right and must be. Affirmed.

[MR. CHIEF JUSTICE FULLER and JUSTICES BREWER and FIELD each delivered a dissenting opinion.]

#### NOTES

1. A federal statute enacted in 1907 made it a felony to harbor for any immoral purpose any alien woman within three years after her entry into the United States, and provided for the deportation of any alien woman found practicing prostitution within this period. Defendant, an operator of a house of prostitution, was indicted and convicted for violation of this statute. In *Keller v. United States*, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. 470, 16 Ann. Cas. 1066 (1909), defendant's conviction was reversed and the statute held invalid, the court saying: "But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If this be possible, the door is open to the assumption by the national government of an almost unlimited body of legislation." Justice Holmes, with the concurrence of Justices Harlan and Moody, dissented on the ground that if Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish not only those who cooperate in their fraudulent entry but also those who cooperate in an equally unlawful stay.

2. In *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 581, 61 Sup. Ct. 399 (1941) it was held that the federal Alien Registration Act of 1940 rendered a nonconflicting state alien registration law inoperative, three justices dissenting. Mr. Justice Black, speaking for the court, said that when Congress enacted this law "it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against."

#### SHAUGHNESSY v. UNITED STATES EX REL. MEZEL

Supreme Court of the United States, 1953.  
345 U. S. 206, 97 L. ed. 956, 73 Sup. Ct. 625.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case concerns an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back. The issue is whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad. After a hearing on respondent's petition for a writ of habeas corpus, the District Court so held and authorized his temporary admission on \$5,000 bond.

The Court of Appeals affirmed that action, but directed reconsideration of the terms of the parole. Accordingly, the District Court entered a modified order reducing bond to \$3,000 and permitting respondent to travel and reside in Buffalo, New York. Bond was posted and respondent released. Because of resultant serious problems in the enforcement of the immigration laws, we granted certiorari. 344 U. S. 809.

Respondent's present dilemma springs from these circumstances: Though, as the District Court observed, "[t]here is a certain vagueness about [his] history," respondent seemingly was born in Gibraltar of Hungarian or Rumanian parents and lived in the United States from 1923 to 1948. In May of that year he sailed for Europe, apparently to visit his dying mother in Rumania. Denied entry there, he remained in Hungary for some 19 months, due to "difficulty in securing an exit permit." Finally, armed with a quota immigration visa issued by the American Consul in Budapest, he proceeded to France and boarded the *Ile de France* in Le Havre bound for New York. Upon arrival on February 9, 1950, he was temporarily excluded from the United States by an immigration inspector acting pursuant to the Passport Act as amended and regulations thereunder. Pending disposition of his case he was received at Ellis Island. After reviewing the evidence, the Attorney General on May 10, 1950, ordered the temporary exclusion to be made permanent without a hearing before a board of special inquiry, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." That determination rested on a finding that respondent's entry would be prejudicial to the public interest for security reasons. But thus far all attempts to effect respondent's departure have failed: Twice he shipped out to return whence he came; France and Great Britain refused him permission to land. The State Department has unsuccessfully negotiated with Hungary for his readmission. Respondent personally applied for entry to about a dozen Latin American countries but all turned him down. So in June 1951 respondent advised the Immigration and Naturalization Service that he would exert no further efforts to depart. In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in.

Asserting unlawful confinement on Ellis Island, he sought relief through a series of habeas corpus proceedings. After four unsuccessful efforts on respondent's part, the United States District Court for the Southern District of New York on November 9, 1951, sustained the writ. The District Judge, vexed by the problem of "an alien who has no place to go," did not question the validity of the exclusion order but deemed further "detention" after 21 months excessive and justifiable only by affirmative proof of respondent's danger to the public safety. When the Government declined to divulge such evidence, even *in camera*,

the District Court directed respondent's conditional parole on bond. By a divided vote, the Court of Appeals affirmed. Postulating that the power to hold could never be broader than the power to remove or shut out and that to "continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty," the court found respondent's "confinement" no longer justifiable as a means of removal elsewhere, thus not authorized by statute, and in violation of due process. Judge Learned Hand, dissenting, took a different view. The Attorney General's order was one of "exclusion" and not "deportation"; respondent's transfer from ship to shore on Ellis Island conferred no additional rights; in fact, no alien so situated "can force us to admit him at all."

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. The Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U. S. 581; *Fong Yue Ting v. United States*, 149 U. S. 698; *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537; *Harisiades v. Shaughnessy*, 342 U. S. 580. In the exercise of these powers, Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency. Under it, the Attorney General, acting for the President, may shut out aliens whose "entry would be prejudicial to the interests of the United States." And he may exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest. The Attorney General in this case proceeded in accord with these provisions; he made the necessary determinations and barred the alien from entering the United States.

It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. The Japanese Immigrant Case (*Kaoru Yamataya v. Fisher*), 189 U. S. 86, 100-101; *Wong Yang Sung v. McGrath*, 339 U. S. 33, 49-50; *Kwong Hai Chew v. Colding*, 344 U. S. 590, 598. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, *supra*, 338 U. S. at page 544; *Nishimura Ekiu v. United States*, 142 U. S. 651, 660. And because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; "it is not within the province of

any court, unless expressly authorized by law, to review the determination of the political branch of the Government." United States ex rel. Knauff v. Shaughnessy, *supra*, 338 U. S. at page 543; Nishimura Ekiu v. United States, *supra*, 142 U. S. at page 660. In a case such as this, courts cannot retry the determination of the Attorney General. United States ex rel. Knauff v. Shaughnessy, *supra*, 338 U. S. at page 546; Ludecke v. Watkins, 335 U. S. 160, 171-172.

Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding. Concededly, his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion. But that is true whether he enjoys temporary refuge on land, Nishimura Ekiu v. United States, *supra*, or remains continuously aboard ship. United States v. Jung Ah Lung, 124 U. S. 621, 626; Chin Yow v. United States, 208 U. S. 8, 12. In sum, harborage at Ellis Island is not an entry into the United States. \* \* \* For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws. \* \* \*

To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. Kwong Hai Chew v. Colding, 344 U. S. 590, 601; *Cf.* Delgadillo v. Carmichael, 332 U. S. 388. Only the other day we held that under some circumstances temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard. Kwong Hai Chew v. Colding, *supra*. Chew, an alien seaman admitted by an Act of Congress to permanent residence in the United States, signed articles of maritime employment as chief steward on a vessel of American registry with home port in New York City. Though cleared by the Coast Guard for his voyage, on his return from four months at sea he was "excluded" without a hearing on security grounds. On the facts of that case, including reference to § 307(d) (2) of the Nationality Act of 1940, 8 U. S. C. § 707(d) (2) [F. C. A. § 707(d) (2)], we felt justified in "assimilating" his status for constitutional purposes to that of continuously present alien residents entitled to hearings at least before an executive or administrative tribunal. *Id.*, 344 U. S. at pages 596, 599-601. Accordingly, to escape constitutional conflict we held the administrative regulations authorizing exclusion without hearing in certain security cases inapplicable to aliens so protected by the Fifth Amendment. *Id.*, 344 U. S. at page 600.

But respondent's history here drastically differs from that disclosed in Chew's case. Unlike Chew who with full security clearance and documentation pursued his vocation for four months aboard an American ship, respondent, apparently without authorization or reentry

papers, simply left the United States and remained behind the Iron Curtain for 19 months. Moreover, while § 307 of the 1940 Nationality Act regards maritime service such as Chew's to be continuous residence for naturalization purposes, that section deems protracted absence such as respondent's a clear break in an alien's continuous residence here. In such circumstances, we have no difficulty in holding respondent an entrant alien or "assimilated to [that] status" for constitutional purposes. *Id.*, 344 U. S. at page 599. That being so, the Attorney General may lawfully exclude respondent without a hearing as authorized by the emergency regulations promulgated pursuant to the Passport Act. Nor need he disclose the evidence upon which that determination rests. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537.

There remains the issue of respondent's continued exclusion on Ellis Island. Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. *United States ex rel. Polymeris v. Trudell*, 284 U. S. 279. While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore "shall not be considered a landing" nor relieve the vessel of the duty to transport back the alien if ultimately excluded. And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border. \* \* \*

Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right. It is true that resident aliens temporarily detained pending expeditious consummation of deportation proceedings may be released on bond by the Attorney General whose discretion is subject to judicial review. *Carlson v. Landon*, 342 U. S. 524. By that procedure aliens uprooted from our midst may rejoin the community until the Government effects their leave. An exclusion proceeding grounded on danger to the national security, however, presents different considerations; neither the rationale nor the statutory authority for such release exists. Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding; Congress in 1950 declined to include such authority in the statute. That exclusion by the United States plus other nations' inhospitality results in present hardship cannot be ignored. But, the times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs. Whatever our individual estimate of that policy and the fears on which it rests,

respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate. *Harisiades v. Shaughnessy*, 342 U. S. 580, 590-591.

Reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting. \* \* \*

MR. JUSTICE JACKSON forcefully points out the danger in the Court's holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General. I join MR. JUSTICE JACKSON in the belief that Mezei's continued imprisonment without a hearing violates due process of law.

No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as "foreign subjects who are socially dangerous." Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken "without due process of law." This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, dissenting.

Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint. Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our

gates. Lord Mansfield, in the celebrated case holding that slavery was unknown to the common law of England, ran his writ of habeas corpus in favor of an alien, an African Negro slave, and against the master of a ship at anchor in the Thames. \* \* \*

Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien. This is at the root of our holdings that the resident alien must be given a fair hearing to test an official claim that he is one of a deportable class. *Wong Yang Sung v. McGrath*, 339 U. S. 33.

The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed. Both the old proceeding by which one may be bound to keep the peace and the newer British "preventive detention" are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process, and as a result the concentration camps were populated with victims of summary executive detention for secret reasons. That is what renders Communist justice such a travesty. There are other differences, to be sure, between authoritarian procedure and common law, but differences in the process of administration make all the difference between a reign of terror and one of law. Quite unconsciously, I am sure, the Government's theory of custody for "safekeeping" without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the "protective custody" of the Nazis more than of any detaining procedure known to the common law. Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere. That these apprehensive surmises are not "such stuff as dreams are made on" appears from testimony of a top immigration official concerning an applicant that "He has no rights."

Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without

due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law? Here we have a case that lies between the taking of life and the taking of property; it is the taking of liberty. It seems to me that this, occurring within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law.

Exclusion of an alien without judicial hearing, of course, does not deny due process when it can be accomplished merely by turning him back on land or returning him by sea. But when indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them. This is the more due him when he is entrapped into leaving the other shore by reliance on a visa which the Attorney General refuses to honor. \* \* \*

The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else. \* \* \*

It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

#### NOTES

1. An American veteran of World War II, a naturalized citizen, married, with the approval of the commanding general in Germany, a German-born woman who was a civilian employee of the War Department in Germany. When she sought to enter the United States under the War Brides Act, the Attorney-General, under the authority of wartime security regulations, excluded her without a hearing upon the finding that her admission would be prejudicial to the interests of the United States and that disclosure of the confidential information on which such finding was based would likewise endanger the public security. The Supreme Court held that the determination of the Attorney-General was not reviewable by the courts, and that the pertinent regulations were not invalid as an undue delegation of legislative power or violation of due process of law, since an alien seeking admission to this country may not do so under any claim of right, and the power to exclude him stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. Justices Frankfurter, Jackson and Black dissented; Justices Douglas and Clark did not participate. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 94 L. ed. 317, 70 Sup. Ct. 309 (1950).

2. Certain aliens, former members of the Communist Party, were ordered deported on the ground that, after entering the United States, they had become members while this party advocated overthrow of the government by force or violence. The deportation orders were based on a provision of the Alien Registration Act of 1940 which requires deportation of any alien who was at the time

of entering the United States or has been "at any time thereafter" a member of an organization advocating the unlawful overthrow of the government. Attacks upon the validity of this provision were rejected by the Supreme Court in *Harisiades v. Shaughnessy*, 342 U. S. 580, 96 L. ed. 586, 72 Sup. Ct. 512 (1952). It was held that the United States had power to expel an alien, notwithstanding his long residence in this country, that the exercise of this power by the challenged statute violated neither due process nor the right of free speech, that the provision for deportation because of membership prior to the effective date of the statute did not constitute an *ex post facto* law, and that, in any event, this prohibition was not applicable to the deportation of aliens. Justices Douglas and Black dissented.

3. In *Bridges v. Wixon*, 326 U. S. 135, 89 L. ed. 2103, 65 Sup. Ct. 1443 (1945) one of the grounds for the Supreme Court's reversal of an order for the deportation of Bridges was that the administrative proceedings had been unfair in that certain evidence had been improperly received. The government's case was based upon allegations that Bridges was deportable because of membership in, or affiliation with, the Communist Party. On this point the court held that the evidence, while establishing cooperation with the Communist Party, did not show membership or affiliation within the meaning of the statute. Chief Justice Stone and Justices Roberts and Frankfurter dissented.

4. A naturalized American citizen was convicted of a conspiracy to violate the Espionage Act of 1917. Subsequently his citizenship was revoked and his certificate of naturalization canceled on the ground of fraud in the procurement thereof. After the required hearings, his deportation was ordered by the Attorney-General under an act of Congress permitting the deportation of "aliens" so convicted. The Supreme Court held that the act applied to denaturalized persons, regardless of whether their citizenship was canceled before or after conviction. Justices Frankfurter, Black and Jackson dissented on the ground that the statute should be read to apply only to one who was an alien when convicted. *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U. S. 521, 94 L. ed. 307, 70 Sup. Ct. 329 (1950).

5. An alien may be deported for membership in the Communist Party without proof that he knew the party advocates the violent overthrow of the government and even though his membership was terminated before passage of the Internal Security Act of 1950 and before there were any legal sanctions against such membership. Petitioner, an alien of Mexican birth who had been living in the United States for thirty-six years and was a member of the party from 1944 to 1946, was ordered deported on that specific ground by a hearing officer for the Immigration and Naturalization Service. The court sustained the act (Justices Black and Douglas dissenting) against the petitioner's allegation of its invalidity as applied to him. In an opinion by Mr. Justice Frankfurter it was held that support, or even demonstrated knowledge, of the party's advocacy of violence was not a prerequisite to deportation under the Act. The court met the due process argument by citing the congressional finding, expressed in the Act, that the Communist movement is a world-wide conspiracy of revolution and terrorism, and it relied upon the broad power of Congress over the admission of aliens and their right to remain, touching as it does basic aspects of national sovereignty. *Galvan v. Press*, 347 U. S. 522, 98 L. ed. 911, 74 Sup. Ct. 737 (1954).

6. In *Barber v. Gonzales*, 347 U. S. 637, 98 L. ed. 1009, 74 Sup. Ct. 822 (1954) it was held that a Filipino, born a national of the United States in the Philippine Islands, who entered the continental United States prior to the passage of the Philippine Independence Act of 1934, and who was sentenced to imprisonment thereafter for crimes involving moral turpitude, could not be deported as an alien who "after entry" committed such crimes. The court reasoned that Gonzales had not made an "entry" into the United States within the meaning

of the applicable statute, since his arrival was as a national moving from one of our insular possessions to the mainland. Justices Minton, Reed and Burton dissented.

7. With respect to restrictions placed on aliens and the administration of laws pertaining thereto, see generally, Konvitz, *The Alien and the Asiatic in American Law* (1946); Konvitz, *Civil Rights in Immigration* (1953); Preuss, *Denaturalization on the Ground of Disloyalty*, 36 *Am. Pol. Sci. Rev.* 701 (1942); Balch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles*, 29 *Minn. L. Rev.* 405 (1945); Boudin, *The Settler Within Our Gates*, 26 *N. Y. U. L. Rev.* 266, 451, 634 (1951).

### Section 3.—The Privileges and Immunities of United States Citizens.

#### SLAUGHTER-HOUSE CASES.

Supreme Court of the United States, 1873.  
16 Wall. 36, 21 L. ed. 394.

MR. JUSTICE MILLER now, April 14, 1873, delivered the opinion of the Court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that state. \* \* \*

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the state courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the state court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An Act to protect the health of the City of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company." \* \* \*

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landing and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the state for that purpose. \* \* \*

The Act divides itself into two main grants of privilege,—the one in reference to stock-landings and stock-yards, and the other to slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing-places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the state or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else.

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may now be questioned in some of its details. \* \* \*

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that state or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the state, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:—

That it abridges the privileges and immunities of citizens of the United States; \* \* \*.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. \* \* \*

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the Articles of the old Confederation. \* \* \*

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." \* \* \*

Fortunately we are not without judicial construction of this clause of the Constitution. \* \* \* [Here the Court cites and briefly considers *Corfield v. Coryell*, 4 Wash. C. C. 371, *Ward v. Maryland*, 12 Wall. 430, and *Paul v. Virginia*, 8 Wall. 180.]

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition

against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada*, 6 Wall. 36. It is said to be the (a) right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada*.

Another (b) privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. (c) The right to peaceably assemble and petition for redress of grievances, (d) the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. (e) The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, (f) all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citi-

zenship of a state. One of these privileges is conferred by the very article under consideration. (g) It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the (h) Thirteenth and (i) Fifteenth articles of amendment, and (j) by the other clause of the Fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration. \* \* \*

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the federal power. It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the states in this matter in the hands of the federal government.

We are not without judicial interpretation, therefore, both state and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment Con-

gress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are Affirmed.

[MR. CHIEF JUSTICE CHASE AND JUSTICES FIELD, SWAYNE AND BRADLEY dissented, the last three delivering dissenting opinions. In summary their view was, that the restrictive definition given by the majority rendered the clause nugatory, that with nation-conferred privileges and immunities "no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character;" that rightly understood the privileges and immunities meant were the traditionally recognized rights of free men such as were enumerated in the Declaration of Independence and by Justice Washington in *Corfield v. Coryell*, the rights to life, liberty and property, including rights to engage in the common callings, professions and trades except as these might be regulated for the public welfare and by uniform regulations applicable to all persons; that the portion of the act which entirely prohibited all but the favored corporation from owning slaughter-houses in so large an area was not reasonably necessary to the protection of the health of the community.]

MR. JUSTICE BRADLEY said: "The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the rights of others to choose a lawful calling, and an infringement of personal liberty. \* \* \* Admitting, therefore, that formerly the states were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except in a few specified cases, that cannot be said now, since the adoption of the Fourteenth Amendment. In my judgment it was the intention of the people of this country in adopting that amendment to provide National security against violation by the states of the fundamental rights of the citizen."

#### NOTES

1. The Slaughter-House Cases gave rise to one of the most prolonged periods of indecision that the Supreme Court has ever experienced. The member-

ship of the Court had completely changed since the decision in *Dred Scott v. Sandford*, 19 How. 393, 15 L. ed. 691 (1857). The Fourteenth Amendment, the second of the reconstruction Amendments, became operative July 28, 1868, and was now before the Court for its first interpretation. The records in the cases were filed in the Supreme Court in 1870. The cases were argued in January, 1872, and reargued in February, 1873, and in April were decided by a five-to-four majority. See 3 Warren, *The Supreme Court in United States History* (1922), ch. 32.

2. The decision in the Slaughter-House Cases had the practical effect of rendering the privileges or immunities clause of the Fourteenth Amendment a dead letter. In the language of Mr. Justice Field's dissent, it became "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." The effect of the decision was to forbid the states from abridging any privilege or immunity granted to citizens of the United States by the federal Constitution or by federal statutes or treaties. This result, of course, had already been achieved by the "supremacy clause" of Article VI. As a matter of fact, the supremacy clause is considerably broader in scope because it serves to protect the alien, as well as the citizen, and not merely from state legislation but from state action of any kind which infringes upon any right conferred by federal law.

Until 1935, the Supreme Court repeatedly refused to modify the position taken in the Slaughter-House Cases. During this period forty-five cases went to the court in which the argument was advanced by counsel that the challenged state legislation infringed the privileges or immunities clause. In none of them was the contention upheld. But in *Colgate v. Harvey*, 296 U. S. 404, 80 L. ed. 299, 56 Sup. Ct. 252, 102 A. L. R. 54 (1935) the court held that an income tax law of Vermont which subjected to a 4 per cent tax interest derived from money loans, except loans made within the state where the rate of interest was not more than 5 per cent, was invalid as an abridgement of a privilege of federal citizenship: the right to lend money in a state other than that in which the citizen resides, free from discriminatory taxation by the latter state. Justice Stone wrote a dissenting opinion concurred in by Justices Brandeis and Cardozo. Five years later, in *Madden v. Kentucky*, 309 U. S. 83, 84 L. ed. 590, 60 Sup. Ct. 406, 125 A. L. R. 1383 (1940) a similar law of Kentucky was held valid and *Colgate v. Harvey* was expressly overruled.

In *Edwards v. California*, 314 U. S. 160, 86 L. ed. 119, 62 Sup. Ct. 164 (1941) defendant was convicted of violating a California statute which forbade bringing into the state any non-resident indigent person. The court unanimously held the statute unconstitutional and set aside the conviction. Five of the justices rested the decision on the commerce clause, reading it as impliedly forbidding states to make such a regulation of interstate commerce. Justice Douglas, in a separate opinion in which Justices Black and Murphy concurred, rested the result on the privileges or immunities clause of the Fourteenth Amendment, expressly leaving open the question whether the commerce clause was violated. Justice Jackson in a separate opinion thought the result sustainable under either clause but preferred to rest it on the privileges or immunities clause. Justice Douglas argued that "the right to move freely from state to state is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." He conceded that this right was not specifically granted by the Constitution but pointed out that "before the Fourteenth Amendment it was recognized as a right fundamental to the national character of our federal government." He cited *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745 (1868), a decision rendered prior to the adoption of the Fourteenth Amendment, in which the court held unconstitutional a Nevada tax "upon every person leaving the state" by common carrier, on the ground that the right to move freely throughout the nation was a right of national citizenship. In

Justice Douglas' view the fact "that the right was implied did not make it any the less 'guaranteed' by the Constitution."

In *Snowden v. Hughes*, 321 U. S. 1, 6-7, 88 L. ed. 497, 64 Sup. Ct. 397 (1944) Chief Justice Stone made the following restatement of the meaning of this clause: "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. *Slaughter-House Cases*, 16 Wall. 36, 74, 79; *Maxwell v. Bugbee*, 250 U. S. 525, 538; *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 539; *Madden v. Kentucky*, 309 U. S. 83, 90-93. The right to become a candidate for state office, like the right to vote for the election of state officers, *Minor v. Happersett*, 21 Wall. 162, 170-178; *Pope v. Williams*, 193 U. S. 621, 632; *Breedlove v. Suttles*, 302 U. S. 277, 283, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause." See also, for an informative discussion of this clause, the opinion of Justice Roberts, concurred in by Justice Black, in *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 83 L. ed. 1423, 59 Sup. Ct. 954 (1939).

3. The student will be interested to note, as he proceeds later with a study of the due process of law clause of the Fourteenth Amendment (which was passed over lightly in the argument before the court in the principal case and in the opinion of Justice Miller), that the rejected "fundamental rights" doctrine espoused by the minority justices later found its way into the constitutional law of the United States through its adoption by the Supreme Court as a definition of due process of law. Through an increasingly elastic interpretation of the due process and equal protection of the laws guaranties of the Fourteenth Amendment, many rights and immunities have been judicially safeguarded against state action which has been characterized as "arbitrary," "capricious," or "unreasonable." It is probable that some of these rights would have been classified as privileges or immunities of national citizenship if the *Slaughter-House Cases* had been decided differently. See *McGovney, Privileges or Immunities Clause, Fourteenth Amendment*, 4 Iowa L. Bull. 219 (1918), 2 *Selected Essays on Constitutional Law* (1938), 402; *Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey*, 87 U. of Pa. L. Rev. 262 (1939); *Franklin, The Foundations and Meaning of the Slaughter-House Cases*, 18 Tulane L. Rev. 1, 218 (1943).

### MINOR v. HAPPERSETT.

Supreme Court of the United States, 1874.

21 Wall. 162, 22 L. ed. 627.

[Error to the Supreme Court of Missouri. Mrs. Minor brought an action in an inferior court of Missouri against a registrar of voters because of his refusal to register her as a voter at a general election in which presidential electors, a member of Congress and other officers were to be chosen. He relied for his refusal upon the constitution of Missouri which gave the privilege of voting only to male citizens of the United States. The Supreme Court of Missouri on appeal had affirmed a judgment for the defendant.]

CHIEF JUSTICE WAITE delivered the opinion of the Court. \* \* \*

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the state cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the Fourteenth Amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this Amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. \* \* \*

\* \* \* The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the Amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The Amendment prohibited the state, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the states, of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives are to be chosen by the people of the states, and the electors in each state must have the qualifications requisite for electors of the most numerous branch of the state legislature. Senators are to be chosen by the legislatures of the states, and necessarily the members of the legislature required to make the choice are elected by the voters of the state. Each state must appoint in such manner, as the legislature thereof may direct, the electors to elect the President and Vice-President. \* \* \*

The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. \* \* \* This makes it proper to inquire whether suffrage was coextensive with the citizenship of the states at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the federal Constitution was adopted, all the states, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no state were all citizens permitted to vote. [The various electoral qualifications of male sex, age, property-holding and taxpaying prescribed in those constitutions are here stated.] \* \* \*

As has been seen, all the citizens of the states were not invested with the right of suffrage. \* \* \* Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here.

\* \* \*

Judgment affirmed.

## NOTES

1. The reported case, in so far as it relates to suffrage for women, has of course been superseded by the Nineteenth Amendment, ratified by the required number of states in 1920, which provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The Fifteenth Amendment, ratified in 1870, also operates as a prohibition of any denial to citizens of the United States of the right to vote on account of race, color, or previous condition of servitude. The power specifically given to Congress to enforce these Amendments by appropriate legislation is limited to those denials of suffrage which fall within the terms of the Amendments. It should also be borne in mind that, independent of the privileges or immunities clause, Congress and the courts have power to protect both citizens and non-citizens against any denial by the states of the equal protection of the laws. Cases dealing with federal protection of civil rights, including those involving enforcement of the guaranty of equality in suffrage, are included in Chapter IX of this case-book.

2. In several cases the Supreme Court was urged to interpret the privileges or immunities clause as imposing the same restrictions upon the states as the first eight Amendments to the Constitution impose upon the national government. But this construction, which would have resulted in the inclusion of the fundamental guaranties of personal liberty contained in the Bill of Rights among the privileges or immunities of federal citizenship protected by the Fourteenth Amendment, has been rejected. The following cases may be cited as holding (either directly or in effect) that the rights claimed are not privileges or immunities of federal citizenship: *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1875) (right of trial by jury in suits at common law, guaranteed by the Seventh Amendment); *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. 580 (1886) (right to bear arms, guaranteed by the Second Amendment); *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. 448 (1900) (right of trial by jury in criminal prosecutions, guaranteed by the Sixth Amendment); *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. 111 (1884), *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. 448 (1900) (guaranty against prosecution for a capital, or otherwise infamous crime, except on indictment of a grand jury, contained in the Fifth Amendment—decision in the *Hurtado* case under due process clause); *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. 650 (1904) (right in a criminal case to be confronted by witnesses, included in the Sixth Amendment—decision under due process clause); *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. 14 (1908), *Adamson v. California*, 332 U. S. 46, 91 L. ed. 1903, 67 Sup. Ct. 1672, 171 A. L. R. 1223 (1947) (protection against compulsory self-incrimination, afforded by the Fifth Amendment).

For discussion of the issues involved, see, generally, Flack, *The Adoption of the Fourteenth Amendment* (1908); Collins, *The Fourteenth Amendment and the States* (1912); Swisher, *American Constitutional Development* (1943), ch. 15; Carr, *Federal Protection of Civil Rights* (1947). For a recent informative study, in the wake of the decision in *Adamson v. California*, see Fairman and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 *Stanf. L. Rev.* 5 (1949).

## CHAPTER V

### THE FISCAL, TAXING AND WAR POWERS OF CONGRESS

#### Section 1.—The Fiscal Powers.

##### MCCULLOCH v. MARYLAND.

Supreme Court of the United States, 1819.

4 Wheat. 316, 4 L. ed. 579.

[Congress by act of April 10, 1816 incorporated "the subscribers to the Bank of the United States" and pursuant to its charter the corporation established a branch bank in Baltimore which issued bank notes, accepted private deposits, discounted promissory notes and carried on all the usual transactions of a local bank operated for the profit of its shareholders. On February 11, 1818 the general assembly of Maryland enacted a statute to impose a tax on all banks or branches thereof in the State of Maryland not chartered by it. This was an action of debt brought on behalf of the state in the county court of Baltimore County against McCulloch as cashier of the branch bank to recover a penalty for carrying on the branch without paying the tax. The case came to the Supreme Court on writ of error to the Court of Appeals of Maryland.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

\* \* \*

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that prac-

tice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dream-

er was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the Confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the

powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. \* \* \*

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the Constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature,

therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corpora-

tion, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. \* \* \*

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the objects is excepted, take upon themselves the burden of establishing that exception. \* \* \*

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department [or officer] thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. \* \* \*

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in

all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the Bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary, by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience,

to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. \* \* \*

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indis-

pensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straightened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. \* \* \*

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government, from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it. \* \* \*

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for

its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise,

the choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the Act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch? \* \* \*

We are unanimously of opinion, that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. \* \* \*

## NOTES

1. In developing the doctrine of "implied powers" Chief Justice Marshall drew heavily upon Alexander Hamilton's opinion upholding the constitutionality of the first Bank of the United States, chartered in 1791. Hamilton, who had proposed the creation of the bank, argued that every power vested in a government is in its nature sovereign and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions specified in the Constitution. For a discussion of the distinction between "implied," "resulting" and "inherent" powers, see 1 Willoughby, *The Constitutional Law of the United States* (2d ed. 1929), 76-93. See also, Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 *Yale L. J.* 137 (1919).

2. In 1819 Ohio enacted a statute imposing an annual tax of \$50,000 upon each branch of the Bank of the United States within that state and authorizing collection by distraint proceedings upon warrant of the state auditor. The bank secured an injunction in the federal circuit court against Osborn, the auditor, restraining him from executing the statute. Osborn issued a warrant, however, and another officer forcibly seized \$100,000 in specie despite notice of the injunction. The money was delivered to the state treasurer, who, because of the injunction, kept it segregated from the general state funds. The bank amended its bill, adding the state treasurer as defendant, and the federal circuit court ordered the return of the money to the bank on the ground that the tax was unconstitutional. The

Supreme Court, in an opinion by Chief Justice Marshall, affirmed the decree of the lower court and Ohio was obliged to recede from its recalcitrant position. *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. ed. 204 (1824).

3. For the historical setting of *McCulloch v. Maryland*, see 1 Warren, *The Supreme Court in United States History* (1922), ch. 12, and 4 Beveridge, *The Life of John Marshall* (1919), ch. 6.

### JULLIARD v. GREENMAN.

Supreme Court of the United States, 1884.

110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. 122.

[Some of the notes issued by the United States under the Legal Tender Acts, passed during the Civil War and sustained in the Legal Tender Cases, came into the treasury of the United States by redemption or otherwise. Sometime after January 1, 1879, they were reissued in pursuance of an Act of May 31, 1878. Some of those reissued notes were tendered by defendant to plaintiff in payment of a debt and refused, raising the question whether in time of peace Congress constitutionally could continue the legal tender quality of these notes.]

MR. JUSTICE GRAY delivered the opinion of the Court. \* \* \*

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes. \* \* \* Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the Legal Tender Cases, as well as by those who concurred in that decision. *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *Hepburn v. Griswold*, 8 Wall. 616, 636; *Legal Tender Cases*, 12 Wall. 543, 544, 560, 582, 610, 613, 637.

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifi-

cally objected to at the time of the tender. *United States Bank v. Bank of Georgia*, 10 Wheat. 333, 347; *Ward v. Smith*, 7 Wall. 447, 451. The power of Congress to charter a bank was maintained in *McCulloch v. Maryland*, 4 Wheat. 316, and in *Osborn v. United States Bank*, 9 Wheat. 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. \* \* \*

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In *Veazie Bank v. Fenno*, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all state banks, or national banks, or private bankers, paying out the notes of individuals or of state banks, a tax of ten per cent upon the amount of such notes so paid out. *Veazie Bank v. Fenno*, above cited; *National Bank v. United States*, 101 U. S. 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in those words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S. 6.

By the Constitution of the United States, the several states are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers.  
\* \* \*

The states are forbidden, but Congress is expressly authorized, to coin money. The states are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circula-

tion as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. \* \* \* The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and states; and during the Revolutionary War the states, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See *Craig v. Missouri*, 4 Pet. 435, 453; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 313, 334-336; *Legal Tender Cases*, 12 Wall. 557, 558, 622; *Phillips on American Paper Currency*, passim. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow

money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this Court, already cited, afford several examples of this. \* \* \*

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the Act of June 28th, 1834, c. 95, and with regard to silver by the Act of February 28th, 1878, c. 20), issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. \* \* \*

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution, "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or

of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts.

[MR. JUSTICE FIELD delivered a dissenting opinion.]

#### NOTE

1. *Hepburn v. Griswold*, 8 Wall. 603, 19 L. ed. 513 (1870), which held the Legal Tender Acts, passed during the Civil War, unconstitutional as regards payment of debts created before the enactment of the legislation, was decided by a four-to-three vote of the seven-member court. The case had been decided in conference on November 27, 1869, by a vote of five to three, the court then consisting of eight justices, but the judgment was not announced in court until February 7, 1870. Justice Grier, one of the majority, resigned February 1, 1870, on account of advanced age. An Act of April 10, 1869, which went into effect in December, 1869, authorized the increase of the court to nine members. Justices Strong and Bradley, the new justices appointed by President Grant, and the three who dissented in *Hepburn v. Griswold* constituted a five-to-four majority in the Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287, decided May 1, 1871, which overruled the earlier holding. The opinion was written by Justice Strong, with Chief Justice Chase and the three other surviving members of the former majority dissenting. In these circumstances the overturning of the earlier decision in so short a time resulted in charges that the new appointees had been selected for the express purpose of achieving this result. The evidence does not appear to support such a charge. See Ratner, Was the Supreme Court Packed by President Grant? 50 Pol. Sci. Q. 343 (1935); Fairman, Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases, 54 Harv. L. Rev. 977, 1128 (1941). On the Legal Tender Cases generally, see 3 Warren, The Supreme Court in United States History (1922), ch. 31; Swisher, American Constitutional Development (1943), 356-368.

#### NORMAN v. BALTIMORE & OHIO R. CO.

Supreme Court of the United States, 1935.

294 U. S. 240, 79 L. ed. 885, 55 Sup. Ct. 407, 95 A. L. R. 1352.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the "gold clauses" of private contracts for the payment of money. 48 Stat. 112.

This Resolution \* \* \* declares that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" is "against public policy." Such provisions in obligations thereafter incurred are prohibited. The Resolution provides that "Every obligation, heretofore or hereafter incurred, whether or not any such

provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

In No. 270, the suit was brought upon a coupon of a bond made by the Baltimore and Ohio Railroad Company under date of February 1, 1930, for the payment of \$1,000 on February 1, 1960, and interest from date at the rate of  $4\frac{1}{2}$  per cent. per annum, payable semi-annually. The bond provided that the payment of principal and interest "will be made \* \* \* in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930." The coupon in suit, for \$22.50, was payable on February 1, 1934. The complaint alleged that on February 1, 1930, the standard weight and fineness of a gold dollar of the United States as a unit of value "was fixed to consist of twenty-five and eight-tenths grains of gold, nine-tenths fine," pursuant to the Act of Congress of March 14, 1900 (31 Stat. 45); and that by the Act of Congress known as the "Gold Reserve Act of 1934" (January 30, 1934, 48 Stat. 337), and by the order of the President under that Act, the standard unit of value of a gold dollar of the United States "was fixed to consist of fifteen and five-twenty-firsts grains of gold, nine-tenths fine," from and after January 31, 1934. On presentation of the coupon, defendant refused to pay the amount in gold, or the equivalent of gold in legal tender of the United States which was alleged to be, on February 1, 1934, according to the standard of weight and fineness existing on February 1, 1930, the sum of \$38.10, and plaintiff demanded judgment for that amount.

Defendant answered that by Acts of Congress, and, in particular, by the Joint Resolution of June 5, 1933, defendant had been prevented from making payment in gold coin "or otherwise than dollar for dollar, in coin or currency of the United States (other than gold coin and gold certificates)" which at the time of payment constituted legal tender. Plaintiff, challenging the validity of the Joint Resolution under the Fifth and Tenth Amendments, and Article I, Section 1, of the Constitution of the United States, moved to strike the defense. The motion was denied. Judgment was entered for plaintiff for \$22.50, the face of the coupon, and was affirmed upon appeal. The Court of Appeals of the State considered the federal question and decided that the Joint Resolution was valid. 265 N. Y. 37. This Court granted a writ of certiorari, October 8, 1934. \* \* \*

The Joint Resolution of June 5, 1933, was one of a series of measures relating to the currency. These measures disclose not only the purposes of the Congress but also the situations which existed at the time the Joint Resolution was adopted and when the payments under the "gold clauses" were sought. On March 6, 1933, the President, stating that there had been "heavy and unwarranted withdrawals of gold and cur-

rency from our banking institutions for the purpose of hoarding" and "extensive speculative activity abroad in foreign exchange" which had resulted "in severe drains on the Nation's stocks of gold," and reciting the authority conferred by Section 5(b) of the Act of October 6, 1917 (40 Stat. 411), declared "a bank holiday" until March 9, 1933. On the same date, the Secretary of the Treasury, with the President's approval, issued instructions to the Treasurer of the United States to make payments in gold in any form only under license issued by the Secretary.

On March 9, 1933, the Congress passed the Emergency Banking Act. 48 Stat. 1. All orders issued by the President or the Secretary of the Treasury since March 4, 1933, under the authority conferred by Section 5(b) of the Act of October 6, 1917, were confirmed. That section was amended so as to provide that during any period of national emergency declared by the President, he might "investigate, regulate or prohibit," by means of licenses or otherwise, "any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof." The Act also amended Section 11 of the Federal Reserve Act (39 Stat. 752) so as to authorize the Secretary of the Treasury to require all persons to deliver to the Treasurer of the United States "any or all gold coin, gold bullion, and gold certificates" owned by them, and that the Secretary should pay therefor "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." By Executive Order of March 10, 1933, the President authorized banks to be reopened, as stated, but prohibited the removal from the United States, or any place subject to its jurisdiction, of "any gold coin, gold bullion, or gold certificates, except in accordance with regulations prescribed by or under license issued by the Secretary of the Treasury." By further Executive Order of April 5, 1933, forbidding hoarding, all persons were required to deliver, on or before May 1, 1933, to stated banks "all gold coin, gold bullion and gold certificates," with certain exceptions, the holder to receive "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." \* \* \*

On January 30, 1934, the Congress passed the "Gold Reserve Act of 1934" (48 Stat. 337) which, by section 13, ratified and confirmed all the actions, regulations and orders taken or made by the President and the Secretary of the Treasury under the Act of March 9, 1933, or under section 43 of the Act of May 12, 1933, and, by section 12, with respect to the authority of the President to fix the weight of the gold dollar, provided that it should not be fixed "in any event at more than 60 per centum of its present weight." On January 31, 1934, the President issued his proclamation declaring that he fixed "the weight of the

gold dollar to be 15 5/21 grains nine tenths fine," from and after that date.

We have not attempted to summarize all the provisions of these measures. We are not concerned with their wisdom. The question before the Court is one of power, not of policy. And that question touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to "gold clauses" in existing contracts. The Resolution must, however, be considered in its legislative setting and in the light of other measures in *pari materia*. \* \* \*

Second. *The power of the Congress to establish a monetary system.* It is unnecessary to review the historic controversy as to the extent of this power, or again to go over the ground traversed by the Court in reaching the conclusion that the Congress may make treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted, whether that authority be exercised in course of war or in time of peace. *Knox v. Lee*, 12 Wall. 457; *Juilliard v. Greenman*, 110 U. S. 421. We need only consider certain postulates upon which that conclusion rested.

The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I, sec. 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed,"—"a national government, with sovereign powers." *McCulloch v. Maryland*, 4 Wheat. 316, 404-407; *Knox v. Lee*, *supra*, pp. 532, 536; *Juilliard v. Greenman*, *supra*, p. 438. The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard v. Greenman*, *supra*, pp. 439, 440.

The Constitution "was designed to provide the same currency, having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. *Knox v. Lee*, *supra*, p. 545. \* \* \*

Moreover, by virtue of this national power, there attaches to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan v. United States*, 218 U. S. 302, 310. Those limitations arise from the fact that the law "gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value. \* \* \*

Third. *The power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority.* The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of States and municipalities, or of their political subdivisions, that is, to such engagements as are within the reach of the applicable national power. The Government's own contracts—the obligations of the United States—are in a distinct category and demand separate consideration. See *Perry v. United States*, decided this day.

The contention is that the power of the Congress, broadly sustained by the decisions we have cited in relation to private contracts for the payment of money generally, does not extend to the striking down of express contracts for gold payments. The acts before the Court in the legal tender cases, as we have seen, were not deemed to go so far. Those acts left in circulation two kinds of money, both lawful and available, and contracts for payments in gold, one of these kinds, were not disturbed. The Court did not decide that the Congress did not have the constitutional power to invalidate existing contracts of that sort, if they stood in the way of the execution of the policy of the Congress in relation to the currency. \* \* \*

Here, the Congress has enacted an express interdiction. The argument against it does not rest upon the mere fact that the legislation may cause hardship or loss. Creditors who have not stipulated for gold payments may suffer equal hardship or loss with creditors who have so stipulated. The former, admittedly, have no constitutional grievance. And, while the latter may not suffer more, the point is pressed that their express stipulations for gold payments constitute property, and that creditors who have not such stipulations are without that property right. And the contestants urge that the Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.

This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making

contracts about them. See *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357. \* \* \*

The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt. The exercise of this power is illustrated by the provision of section 5 of the Employers' Liability Act of 1908 (35 Stat. 65, 66) relating to any contract the purpose of which was to enable a common carrier to exempt itself from the liability which the Act created. Such a stipulation the Act explicitly declared to be void. In the *Second Employers' Liability Cases*, 223 U. S. 1, 52, the Court decided that as the Congress possessed the power to impose the liability, it also possessed the power "to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it." And this prohibition the Court has held to be applicable to contracts made before the Act was passed. *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603. \* \* \*

The same reasoning applies to the constitutional authority of the Congress to regulate the currency and to establish the monetary system of the country. If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority, they cannot stand.

Fourth, *The effect of the gold clauses in suit in relation to the monetary policy adopted by the Congress.* Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisal of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final. \* \* \*

The Committee on Banking and Currency of the House of Representatives stated in its report recommending favorable action upon the Joint Resolution (H. R. Rep. No. 169, 73d Cong., 1st Sess.):

"The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the present emergency. These gold clauses render ineffective the power of the Government to create a currency and determine the value thereof. If the gold clause, applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country. Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of securities are expressed in a particular form of the circulating medium, particularly when it is the medium upon which the entire credit and currency structure rests."

And the Joint Resolution itself recites the determination of the Congress in these words:

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts."

Can we say that this determination is so destitute of basis that the interdiction of the gold clauses must be deemed to be without any reasonable relation to the monetary policy adopted by the Congress?

The Congress in the exercise of its discretion was entitled to consider the volume of obligations with gold clauses, as that fact, as the report of the House Committee observed, obviously had a bearing upon the question whether their existence constituted a substantial obstruction to the congressional policy. The estimates submitted at the bar indicate that when the Joint Resolution was adopted there were outstanding seventy-five billion dollars or more of such obligations, the annual interest charges on which probably amounted to between three and four billion dollars. It is apparent that if these promises were to be taken literally, as calling for actual payment in gold coin, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin. \* \* \*

But, if the clauses are treated as "gold value" clauses, that is, as intended to set up a measure or standard of value if gold coin is not available, we think they are still hostile to the policy of the Congress and hence subject to prohibition. It is true that when the Joint Resolution was adopted on June 5, 1933, while gold coin had largely been withdrawn from circulation and the Treasury had declared that "gold is not now paid, nor is it available for payment, upon public or private debts," the dollar had not yet been devalued. But devaluation was in prospect and a uniform currency was intended. Section 43 of the Act of May 12, 1933 (48 Stat. 51), provided that the President should have authority, on certain conditions, to fix the weight of the gold dollar as stated, and that its weight as so fixed should be "the standard unit of value" with which all forms of money should be maintained "at a parity." The weight of the gold dollar was not to be reduced by more than 50 per centum. The Gold Reserve Act of 1934 (January 30, 1934, 48 Stat. 337), provided that the President should not fix the weight of the gold dollar at more than 60 per cent. of its present weight. The order of the President of January 31, 1934, fixed the weight of the gold dollar at 15 5/21 grains nine-tenths fine as against the former standard of 25 8/10 grains nine-tenths fine. If the gold clauses interfered with the congressional policy and hence could be invalidated, there appears to be no constitutional objection to that action by the Congress in anticipation of the determination of the value of the currency. And the questions now before us must be determined in the light of that action.

The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their "gold bonds" must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obligations of that sort. It is also common knowledge that a similar situation exists with respect to numerous industrial corporations that have issued their "gold bonds" and must now receive payments for their products in the existing currency. It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency

while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency.

We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.

The judgment and decree, severally under review, are affirmed.

[MR. JUSTICE McREYNOLDS, MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissented, all concurring in a dissenting opinion written by MR. JUSTICE McREYNOLDS.]

#### NOTE

1. Two other cases decided on the same day as the principal case dealt with the issue of whether the government could abrogate the gold clause contracts in its own obligations. *Perry v. United States*, 294 U. S. 330, 79 L. ed. 912, 55 Sup. Ct. 432, 95 A. L. R. 1335 (1935) involved a federal bond issued in 1918 and payable "in United States gold coin of the present standard of value." The court held that the contract was binding upon the United States, but that the plaintiff had failed to show a cause of action for actual damages, since he had not shown that in relation to buying power he had sustained any loss whatever. Plaintiff was forbidden by law to export gold or to engage in transactions in foreign exchange, and there was no free domestic market for gold. Justice Stone, concurring specially, said that the government, through the exercise of its sovereign power to regulate the value of money, had rendered itself immune from liability for its action. In other words, the obligation of the gold clauses was not superior to the government's power to regulate the value of money. "It will not benefit this plaintiff," he said, "to whom we deny any remedy, to be assured that he has an inviolable right to performance of the gold clause." (Congress later withdrew the government's consent to be sued.)

*Nortz v. United States*, 294 U. S. 317, 79 L. ed. 907, 55 Sup. Ct. 428, 95 A. L. R. 1346 (1935) dealt with gold certificates issued by the United States and payable in gold coin. Plaintiff claimed that his compulsory delivery of gold certificates constituted a "taking" of his contract with the government, and he demanded compensation therefor based upon the market price of gold at the time he presented the certificates for redemption. He had

received compensation only in legal tender currency equivalent to the face amount of his certificates. The court held that no damage had been suffered by the government's refusal to pay in gold coin, because the holder, by virtue of governmental legislation and orders, would have been required forthwith to deliver the gold coin to the Treasury. He could not have kept the gold coin, or exported it or dealt in it. He could not have resorted to world markets. There was no free market for gold at the time in the United States or any market available for the plaintiff for the gold coin to which he claimed he was entitled. Therefore no actual loss had been sustained.

The dissenting opinion noted above applied to all three cases. The dissenting justices took the view that the gold clauses were property and that the legislation under challenge destroyed the property rights of bondholders in violation of the due process clause of the Fifth Amendment. The dissent asserted that "under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts and drive into the Treasury all gold within the country, in exchange for incon-vertible promises to pay, of much less value."

## Section 2.—The Taxing, Spending and Property Powers.

### KNOWLTON v. MOORE.

Supreme Court of the United States, 1900.  
178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. 747.

[The case involved the validity of an act of Congress passed in 1898 which taxed the passing of legacies and distributive shares of personalty. The Court interpreted the act as exacting basic percentages of the value of each beneficiary's legacy or share, varying with the degree of relation, or with lack of relation, of the beneficiary to the deceased, with progressively higher percentage rates on legacies and shares that were larger than those to which the basic rates applied.]

MR. JUSTICE WHITE delivered the opinion of the Court. \* \* \*

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. \* \* \* Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe. Smith's *Wealth of Nations*, London ed. of 1811, vol. 3, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes, for the reason that all inheritance and

legacy taxes are considered as levied on the "occasion of a particular isolated act." This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange." \* \* \*

Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. \* \* \*

[Here in answer to a contention that since the states had exclusive power to regulate the disposition of property at death this act of Congress was an encroachment upon that power, it was said, in effect, that the act did not undertake to regulate or determine what dispositions could or could not be made but taxed only where legacies and distributive shares passed in accordance with state law.]

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. \* \* \* [After a review of the cases, the Court held that the tax involved was not a direct tax.]

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of Section 8 of Article 1 of the Constitution, which provides "the duties, imposts and excises shall be uniform throughout the United States." \* \* \* The

two [opposing] contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform. \* \* \* [Here followed an elaborate discussion of this question.]

By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. \* \* \*

It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every state. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the states may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective states, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states. \* \* \*

[MR. JUSTICE BREWER dissented from so much of the opinion as held that a progressive rate of tax could be validly imposed. In other respects he concurred. MR. JUSTICE HARLAN and MR. JUSTICE McKENNA dissented as to the construction of the statute.]

#### NOTE

1. The Constitution confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States" (Art. I, § 8, cl. 1), but limits the power by declaring in the same clause that "all duties, imposts and excises shall be uniform throughout the United States." The Constitution also provides (Art. I, § 9, cl. 4) that "no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." The principal case deals with both the requirement of uniformity and the prohibition against direct taxation except in proportion to the population of the respective states.

In *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253 (1880), a Civil War income tax upon personal earnings and income from personal property was sustained as an indirect tax, the court upholding the view of earlier cases that capitation taxes and taxes on real estate were the only forms of direct taxation. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. 673 (1895), *Id.*, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. 912 (1895), rejected this view and held that taxes on personal property and on the income from both real and personal property were direct taxes and hence subject to the requirement of apportionment. In the *Pollock* cases the source of the income was made the decisive consideration. The theory accepted by the court was that a direct tax is one imposed upon property solely by reason of its ownership and that a tax on the income from property is in substance a tax on the property producing the income, and, consequently, direct. The opinion stated that "we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct, but an indirect tax, in the meaning of the Constitution."

The requirement of apportionment made resort to a system of income taxation that would be accepted as fair and equitable utterly impracticable. Illustrating the rule of apportionment as it would operate if applied to an income tax, Mr. Justice Jackson said: "Take the illustration suggested in the opinion of the Court. Congress lays a tax of thirty millions upon the incomes of the country above a certain designated amount, and directs that tax to be apportioned among the several states according to their numbers, and when so apportioned to be pro-rated amongst the citizens of the respective states coming within the operation of the law. \* \* \* Take the new State of Washington and the old State of Rhode Island, having about the same population. To each would be assigned the same amount of the general assessment. In the former, we will say, there are 5,000 citizens subject to the operation of the law, in the latter 50,000. The citizen of Washington will be required to pay ten times as much as the citizen of Rhode Island on the same amount of taxable income. Extend the rule to all the states, and the result is that the larger the number of those subject to the operation of the law in any given state, the smaller their proportion of the tax and the smaller their rate of taxation, while, in respect to the smaller number in other states, the greater will be their rate of taxation on the same income." 158 U. S. 703, 704.

Eighteen years after the *Pollock* decision (1913) the Sixteenth Amendment was incorporated into the Constitution. It provides: "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." The amendment has been strictly construed as not extending the taxing power of Congress to new subjects, but as merely removing the requirement of apportionment in the matter of income taxes. See *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. 236, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713 (1916), where it was said that "the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment [and] from a consideration of the source whence the income was derived." The effect of the Sixteenth Amendment, therefore, was to transform taxes of the sort which had been held direct in the *Pollock* decision into excises and thus subject to the Constitutional requirement of uniformity.

## FLINT v. STONE TRACY CO.

Supreme Court of the United States, 1911.

220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. 342.

MR. JUSTICE DAY delivered the opinion of the Court.

These cases involve the constitutional validity of § 38 of the act of Congress approved August 5, 1909, known as "The Corporation Tax" law. 36 Stat. c. 6, 11, 112-117. \* \* \*

"Sec. 38. That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory \* \* \* shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, \* \* \*."

This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income over and above \$5,000 received from *all sources* during the year—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above \$5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. \* \* \*

The act \* \* \* does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon

substantial differences between the mere ownership of property and the actual doing of business in a certain way. \* \* \*

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the *Thomas Case*, 192 U. S. 363 *supra*, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable. \* \* \*

It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other non-taxable securities, and in real estate and personal property not used in the business, that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation—upon the authority of the *Pollock case*, *supra*. But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed. In the *Pollock case*, as we have seen, the tax was held unconstitutional, because it was in effect a direct tax on the property solely because of its ownership. \* \* \*

It is \* \* \* well settled by the decisions of this Court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. \* \* \*

#### NOTES

1. *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. 522 (1899) held a tax on sales at business exchanges to be an excise, the court saying: "We think the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of, and actually employed, in the transaction of the business, and separate and apart from the business itself."

2. *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. 493 (1902) held a tax on manufactured tobacco in the hands of dealers to be an excise, the court saying that "it is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use."

3. *Bromley v. McCaughn*, 280 U. S. 124, 74 L. ed. 226, 50 Sup. Ct. 46 (1929) held that a tax on transfers of property by gift *inter vivos*, and not made in contemplation of death, was not a direct tax but an excise and thus valid although not apportioned. Justices Sutherland, Van Devanter and Butler dissented.

4. Although Mr. Chief Justice White said in *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. 236 (1916) that the due process clause of the Fifth Amendment was not a limitation upon the taxing power conferred upon Congress by the Constitution, later cases repudiated this view.

In *Nichols v. Coolidge*, 274 U. S. 531, 71 L. ed. 1184, 47 Sup. Ct. 710, 52 A. L. R. 1081 (1927), it was held that a Federal Estate Tax Act was inapplicable to an irrevocable trust distributable at death but executed before any federal law had been passed taxing such transfers. And *Heiner v. Donnan*, 285 U. S. 312, 76 L. ed. 772, 52 Sup. Ct. 358 (1932) invalidated a provision of the same tax act declaring that gifts made within two years of death would be conclusively presumed to have been made in contemplation thereof and subjecting such gifts to death duties. However, speaking for the court in *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L. ed. 1109, 54 Sup. Ct. 599 (1934), Mr. Justice Sutherland said: "Except in rare and specified instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution." The above mentioned cases were cited in support of this statement. See, generally, Ballard, *Retroactive Federal Taxation*, 48 Harv. L. Rev. 592 (1935), 5 Selected Essays on Constitutional Law (1938), 687.

5. Implied limitations on the taxing powers of the national government and of the states have previously been dealt with in Chapter III, in cases involving the doctrine of intergovernmental tax immunities. No attempt is made here to deal with problems relating to national taxation for revenue purposes as the subject is more suitably covered in courses in Taxation. The cases which follow raise important issues as to the extent to which the taxing power of Congress may be used to effect regulatory, rather than revenue-raising, objectives. Cases involving constitutional limitations on state taxation of commerce are included in chapter VI.

#### UNITED STATES v. KAHRIGER.

Supreme Court of the United States, 1953.

345 U. S. 22, 97 L. ed. 754, 73 Sup. Ct. 510.

MR. JUSTICE REED delivered the opinion of the Court.

The issue raised by this appeal is the constitutionality of the occupational tax provisions of the Revenue Act of 1951 which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the Collector of Internal Revenue. The unconstitutionality of the tax is asserted on two grounds. First, it is said that Congress, under the pretense of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act, 26 U. S. C. (Supp. V) § 3291 [F. C. A. 26 § 3291], and has thus infringed the police power which is reserved to the states. Secondly, it is urged that the registration provisions of the tax violate the privilege against self-incrimination and are arbitrary and vague, contrary to the guarantees of the Fifth Amendment.

The case comes here on appeal, in accordance with 18 U. S. C. § 3731 [F. C. A. 18 § 3731], from the United States District Court for the Eastern District of Pennsylvania, where an information was filed against appellee alleging that he was in the business of accepting wagers and that he willfully failed to register for and pay the occupational tax in question. Appellee moved to dismiss on the ground that the sections upon which the indictment was based were unconstitutional. The District Court sustained the motion on the authority of our opinion

in *United States v. Constantine*, 296 U. S. 287. The court reasoned that while "the subject matter of this legislation so far as revenue purposes is concerned is within the scope of Federal authorities," the tax was unconstitutional in that the information called for by the registration provisions was "peculiarly applicable to the applicant from the standpoint of law enforcement and vice control," and therefore the whole of the legislation was an infringement by the Federal Government on the police power reserved to the states by the Tenth Amendment. *United States v. Kahriger*, 105 F. Supp. 322, 323.

The result below is at odds with the position of the seven other district courts which have considered the matter, and, in our opinion, is erroneous.

In the term following the *Constantine* opinion, this Court pointed out in *Sonzinsky v. United States*, 300 U. S. 506, at page 513, (a case involving a tax on a "limited class" of objectionable firearms alleged to be prohibitory in effect and "to disclose unmistakably the legislative purpose to regulate rather than to tax"), that the subject of the tax in *Constantine* was "described or treated as criminal by the taxing statute." The tax in the *Constantine* case was a special additional excise tax of \$1,000, placed only on persons who carried on a liquor business in violation of state law. The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law.

The substance of respondent's position with respect to the Tenth Amendment is that Congress has chosen to tax a specified business which is not within its power to regulate. The precedents are many upholding taxes similar to this wagering tax as a proper exercise of the federal taxing power. In the *License Tax Cases*, 5 Wall. 462, the controversy arose out of indictments for selling lottery tickets and retailing liquor in various states without having first obtained and paid for a license under the Internal Revenue Act of Congress. The objecting taxpayers urged that Congress could not constitutionally tax or regulate activities carried on within a state. 5 Wall. at page 470. The Court pointed out that Congress had "no power of regulation nor any direct control," 5 Wall. at pages 471, 472, over the business there involved. The Court said if the licenses were to be regarded as by themselves giving authority to carry on the licensed business it might be impossible to reconcile the granting of them with the Constitution. 5 Wall. at page 471.

"But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting

of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it." 5 Wall. at page 471.

Appellee would have us say that because there is legislative history indicating a congressional motive to suppress wagering, this tax is not a proper exercise of such taxing power. In the License Cases, *supra*, it was admitted that the federal license "discouraged" the activities. The intent to curtail and hinder, as well as tax, was also manifest in the following cases, and in each of them the tax was upheld: *Veazie Bank v. Fenno*, 8 Wall. 533 (tax on paper money issued by state banks); *McCray v. United States*, 195 U. S. 27, 59 (tax on colored oleomargarine); *United States v. Doremus*, 249 U. S. 86 and *Nigro v. United States*, 276 U. S. 332 (tax on narcotics); *Sonzinsky v. United States*, 300 U. S. 506 (tax on firearms); *United States v. Sanchez*, 340 U. S. 42 (tax on marihuana).

It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.

It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult. As is well known, the constitutional restraints on taxing are few. "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity." *License Tax Cases*, *supra*, 5 Wall. 471. The remedy for excessive taxation is in the hands of Congress, not the courts. *Veazie Bank v. Fenno*, 8 Wall. 533, 548.

\* \* \*

The difficulty of saying when the power to lay uniform taxes is curtailed, because its use brings a result beyond the direct legislative power of Congress, has given rise to diverse decisions. In that area of abstract ideas, a final definition of the line between state and federal power has baffled judges and legislators. \* \* \*

Where federal legislation has rested on other congressional powers, such as the Necessary and Proper clause or the Commerce clause, this Court has generally sustained the statutes, despite their effect on matters ordinarily considered state concern. When federal power to regulate is found, its exercise is a matter for Congress. Where Congress

has employed the taxing clause a greater variation in the decisions has resulted. The division in this Court has been more acute. Without any specific differentiation between the power to tax and other federal powers, the indirect results from the exercise of the power to tax have raised more doubts. This is strikingly illustrated by the shifting course of adjudication in taxation of the handling of narcotics. The tax ground in the *Veazie Bank* case, *supra*, recognized that strictly state governmental activities such as the right to pass laws were beyond the federal taxing power. That case allowed a tax, however, that obliterated from circulation all state bank notes. A reason was that "the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers." 8 Wall. at page 548. The tax cases cited above in the third preceding paragraph followed that theory. It is hard to understand why the power to tax should raise more doubts because of indirect effects than other federal powers.

Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid. Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power. All the provisions of this excise are adapted to the collection of a valid tax.

Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns. Such data are directly and intimately related to the collection of the tax and are "obviously supportable as in aid of a revenue purpose." *Sonzinsky v. United States*, 300 U. S. 506, at page 513. The registration provisions make the tax simpler to collect.

Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law are called for. In *United States v. Sullivan*, 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income "was derived from business in violation of the National Prohibition Act." 274 U. S. at page 263. "As the defendant's income was taxed, the statute of course required a return. See *United States v. Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U. S. at page 263.

Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or

may not be committed. 8 Wigmore (3d ed., 1940) § 2259(c). If respondent wishes to take wagers subject to excise taxes under § 3285, supra, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.

Finally, we consider respondent's contention that the order of dismissal was correct because a conviction under the sections in question would violate the Due Process Clause because the classification is arbitrary and the statutory definitions are vague. The applicable definitions are 26 U. S. C. (Supp. V) § 3285(b), (d) and (e) [F. C. A. 26 § 3285(b), (d), (e)]. The arbitrariness is said to arise from discrimination because some wagering activities are excluded. The Constitution does not require that a tax statute cover all phases of a taxed or licensed business. Respondent predicates vagueness of the statute upon the use, in defining the subject of the tax, of the description "engaged in the business" of wagering and "usually" in § 3285 (b) (2). We have no doubt the definitions make clear the activities covered and excluded.

Reversed.

MR. JUSTICE JACKSON, concurring.

I concur in the judgment and opinion of the Court, but with such doubt that if the minority agreed upon an opinion which did not impair legitimate use of the taxing power I probably would join it. But we deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other. \* \* \*

But here is a purported tax law which requires no reports and lays no tax except from specified gamblers whose calling in most states is illegal. It requires this group to step forward and identify themselves, not because they like others have income, but because of its source. This is difficult to regard as a rational or good-faith revenue measure, despite the deference that is due Congress. On the contrary, it seems to be a plan to tax out of existence the professional gambler whom it has been found impossible to prosecute out of existence. Few pursuits are entitled to less consideration at our hands than professional gambling, but the plain unwelcome fact is that it continues to survive because a large and influential part of our population patronizes and protects it.

The United States has a system of taxation by confession. That a people so numerous, scattered and individualistic annually assesses itself with a tax liability, often in highly burdensome amounts, is a reassuring sign of the stability and vitality of our system of self government. What surprised me in once trying to help administer these laws was not to discover examples of recalcitrance, fraud or self-serving mistakes in

reporting, but to discover that such derelictions were so few. It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation. But the evil that can come from this statute will probably soon make itself manifest to Congress. The evil of a judicial decision impairing the legitimate taxing power by extreme constitutional interpretations might not be transient. Even though this statute approaches the fair limits of constitutionality, I join the decision of the Court.

MR. JUSTICE FRANKFURTER, dissenting.

The Court's opinion manifests a natural difficulty in reaching its conclusion. Constitutional issues are likely to arise whenever Congress draws on the taxing power not to raise revenue but to regulate conduct. This is so, of course, because of the distribution of legislative power as between the Congress and the State Legislatures in the regulation of conduct.

To review in detail the decisions of this Court, beginning with *Veazie Bank v. Fenno*, 8 Wall. 533, dealing with this ambivalent type of revenue enactment, would be to rehash the familiar. Two generalizations may, however, safely be drawn from this series of cases. Congress may make an oblique use of the taxing power in relation to activities with which Congress may deal directly, as for instance, commerce between the States. Thus, if the dissenting views of Mr. Justice Holmes in *Hammer v. Dagenhart*, 247 U. S. 251, 277, had been the decision of the Court, as they became in *United States v. Darby*, 312 U. S. 100, the effort to deal with the problem of child labor through an assertion of the taxing power in the statute considered in *Child Labor Tax Case*, 259 U. S. 20, would by the latter case have been sustained. However, when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.

Concededly the constitutional questions presented by such legislation are difficult. On the one hand, courts should scrupulously abstain from hobbling congressional choice of policies, particularly when the vast reach of the taxing power is concerned. On the other hand, to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could, as so significantly expounded in the *Child Labor Tax Case*, *supra*, offer an easy way for the legislative imagination to control "any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with \* \* \*." *Child Labor Tax Case*, 259 U. S. at page 38. I say "significantly" because Mr. Justice Holmes and

two of the Justices who had joined his dissent in *Hammer v. Dagenhart*, McKenna and Brandeis, JJ., agreed with the opinion in the *Child Labor Tax Case*. Issues of such gravity affecting the balance of powers within our federal system are not susceptible of comprehensive statement by smooth formulas such as that a tax is nonetheless a tax although it discourages the activities taxed, or, that a tax may be imposed although it may effect ulterior ends. No such phrase, however fine and well-worn, enables one to decide the concrete case.

What is relevant to judgment here is that, even if the history of this legislation as it went through Congress did not give one the libretto to the song, the context of the circumstances which brought forth this enactment—sensationally exploited disclosures regarding gambling in big cities and small, the relation of this gambling to corrupt politics, the impatient public response to these disclosures, the feeling of ineptitude or paralysis on the part of local law-enforcing agencies—emphatically supports what was revealed on the floor of Congress, namely, that what was formally a means of raising revenue for the Federal Government was essentially an effort to check if not to stamp out professional gambling.

A nominal taxing measure must be found an inadmissible intrusion into a domain of legislation reserved for the States not merely when Congress requires that such a measure is to be enforced through a detailed scheme of administration beyond the obvious fiscal needs, as in the *Child Labor Tax Case*, *supra*. That is one ground for holding that Congress was constitutionally disrespectful of what is reserved to the States. Another basis for deeming such a formal revenue measure inadmissible is presented by this case. In addition to the fact that Congress was concerned with activity beyond the authority of the Federal Government, the enforcing provision of this enactment is designed for the systematic confession of crimes with a view to prosecution for such crimes under State law.

It is one thing to hold that the exception, which the Fifth Amendment makes to the duty of a witness to give his testimony when relevant to a proceeding in a federal court, does not include the potential danger to that witness of possible prosecution in a state court, *Brown v. Walker*, 161 U. S. 591, 606, and, conversely, that the Fifth Amendment does not enable States to give immunity from use in federal courts of testimony given in a State court. *Feldman v. United States*, 322 U. S. 487. It is a wholly different thing to hold that Congress, which cannot constitutionally grapple directly with gambling in the States, may compel self-incriminating disclosures for the enforcement of State gambling laws, merely because it does so under the guise of a revenue measure obviously passed not for revenue purposes. The motive of congressional legislation is not for our scrutiny, provided only that the ulterior purpose is not expressed in ways which negate what the

revenue words on their face express and, which do not seek enforcement of the formal revenue purpose through means that offend those standards of decency in our civilization against which due process is a barrier.

I would affirm this judgment.

MR. JUSTICE DOUGLAS, while not joining in the entire opinion, agrees with the views expressed herein that this tax is an attempt by the Congress to control conduct which the Constitution has left to the responsibility of the states.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself." The Court nevertheless here sustains an Act which requires a man to register and confess that he is engaged in the business of gambling. I think this confession can provide a basis to convict him of a federal crime for having gambled before registration without paying a federal tax. 26 U. S. C. (Supp. V) §§ 3285, 3290, 3291, 3294 [F. C. A. 26 §§ 3285, 3290, 3291, 3294]. Whether or not the Act has this effect, I am sure that it creates a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws. The coercion of confessions is a common but justly criticized practice of many countries that do not have or live up to a Bill of Rights. But we have a Bill of Rights that condemns coerced confessions, however refined or legalistic may be the technique of extortion. I would hold that this Act violates the Fifth Amendment. See my dissent in *Feldman v. United States*, 322 U. S. 487, 494-503.

#### NOTES

1. In *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. ed. 817, 42 Sup. Ct. 449, 21 A. L. R. 1432 (1922), discussed in Mr. Justice Frankfurter's dissenting opinion in the principal case, the court invalidated an attempt by Congress to accomplish, through the use of the national taxing power, a purpose to regulate child labor. Speaking for the court, Mr. Chief Justice Taft said: "The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter

result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard."

A previous attempt to deal with the same problem through a federal statute excluding the products of child labor from the channels of interstate commerce had been held invalid in *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101, 38 Sup. Ct. 529, 3 A. L. R. 649 (1918) in a five-to-four decision. This case was expressly overruled in *United States v. F. W. Darby Lumber Co.*, 312 U. S. 100, 85 L. ed. 609, 61 Sup. Ct. 451, 132 A. L. R. 1430 (1941).

2. In *Hill v. Wallace*, 259 U. S. 44, 66 L. ed. 822, 42 Sup. Ct. 453 (1922) legislation of Congress entitled "An Act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes" was held invalid. In addition to a tax of two cents on every \$100 of value imposed by a prior law, this statute imposed a tax of twenty cents a bushel for every bushel involved in every such contract with exception that the twenty cent tax should not apply to such sales when made by or through a board of trade designated by the Secretary of Agriculture who was authorized to designate only such boards of trade as complied with several detailed requirements. The court said: "The act is in essence and on its face a complete regulation of boards of trade, with a penalty of twenty cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power." A subsequent enactment known as the Grain Futures Act of 1922, regulating boards of trade and members thereof engaged in sale of "futures" in grain, was upheld as a valid regulation of interstate commerce. *Board of Trade v. Olsen*, 262 U. S. 1, 67 L. ed. 839, 43 Sup. Ct. 470 (1923).

3. Coercive penalty taxes imposed upon coal producers for refusal to become "code members" or for failure to comply with the code of fair competition set up under the Bituminous Coal Act of 1937 were sustained in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. ed. 1263, 60 Sup. Ct. 907 (1940). By its terms the regulatory features of the statute applied "only to matters and transactions in or directly affecting interstate commerce in bituminous coal." The court said: "Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. \* \* \* Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. \* \* \* It is so utilized here. The regulatory provisions are clearly within the power of Congress under the Commerce Clause of the Constitution."

## UNITED STATES v. BUTLER.

Supreme Court of the United States, 1936.

297 U. S. 1, 80 L. ed. 477, 56 Sup. Ct. 312, 102 A. L. R. 914.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, conflict with the Federal Constitution.

Title I of the statute is captioned "Agricultural Adjustment." Section 1 recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with conse-

quent destruction of farmers' purchasing power and breakdown in orderly exchange, which in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

Section 2 declares it to be the policy of Congress:

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

The base period, in the case of cotton, and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

The further policies announced are an approach to the desired equality by gradual correction of present inequalities "at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets," and the protection of consumers' interests by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

Section 8 provides, amongst other things, that "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. \* \* \*

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

Section 9 (a) enacts:

"To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. \* \* \* The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. \* \* \*

\* \* \* On July 14, 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under §§ 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid. Upon appeal the Circuit Court of Appeals reversed the order. The judgment under review was entered prior to the adoption of the amending act of August 24, 1935, and we are therefore concerned only with the original act. \* \* \*

First. [The opinion here distinguishes *Frothingham v. Mellon*, 262 U. S. 447, on the ground that that case did not deal with an earmarked tax. It states that the Agricultural Adjustment Act both levied the tax and appropriated it to a specified purpose, that if the spending was for an unconstitutional purpose, the tax to raise the money therefor would likewise be unconstitutional, and that for that reason the processors on whom this particular tax was laid had standing to challenge the constitutionality of the expenditure.]

Second. The Government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article I, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case.  
\* \* \*

Article I, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power "to regulate Commerce \* \* \* among the several States." Despite a reference in its first section to a burden upon, and an obstruction of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

The clause thought to authorize the legislation,—the first,—confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. \* \* \*" It is not contended

that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

Nevertheless the Government asserts that warrant is found in this clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States.

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they be construed to effectuate the intent of the instrument?

Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later

enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. \* \* \* Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. \* \* \*

That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his well known Report on Manufactures, states that the purpose must be "general, and not local." Monroe, an advocate of Hamilton's doctrine, wrote: "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not." Story says that if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare. \* \* \*

How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare.

We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end. \* \* \*

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder v. United States*, 268 U. S. 5, 17. \* \* \*

In the Child Labor Tax Case [*Bailey v. Drexel Furniture Co.*], 259 U. S. 20, and in *Hill v. Wallace*, 259 U. S. 44, this court had before it

statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states,—matters not within any power conferred upon Congress by the Constitution—and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse of the power to tax. \* \* \* These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton, and exempt those who agree so to do, with the purpose of benefiting producers.

Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. \* \* \*

But if the plan were one for purely voluntary cooperation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper governmental purposes cannot justify contracts which are not within federal power. \* \* \*

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. \* \* \*

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow

that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states. \* \* \*

Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. But to this fatal conclusion the doctrine contended for would inevitably lead. \* \* \*

The judgment is

Affirmed.

MR. JUSTICE STONE, dissenting. \* \* \*

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

3. As the present depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditures of public money in aid of farmers is not within the specifically granted

power of Congress to levy taxes to "provide for the \* \* \* general welfare." The opinion of the Court does not declare otherwise. \* \* \*

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture. The tax is unlike the penalties which were held invalid in the Child Labor Tax Case, 259 U. S. 20, in *Hill v. Wallace*, 259 U. S. 44, in *Linder v. United States*, 268 U. S. 5, 17, and in *United States v. Constantine*, 296 U. S. 287, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are extended, and would equally be accomplished by any like use of public funds, regardless of their source.

The method may be simply stated. Out of the available fund payments are made to such farmers as are willing to curtail their productive acreage, who in fact do so and who in advance have filed their written undertaking to do so with the Secretary of Agriculture. In saying that this method of spending public moneys is an invasion of the reserved powers of the states, the Court does not assert that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. It does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specifically granted power. But it is declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage. Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. In any event it is insisted that even though not coercive the expenditure of public funds to induce the recipients to curtail production is itself an infringement of state

power, since the federal government cannot invade the domain of the states by the "purchase" of performance of acts which it has no power to compel. \* \* \*

It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

The Constitution requires that public funds shall be spent for a defined purpose, the promotion of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition, incorporated in the Morrill Act, 12 Stat. 503, 26 Stat. 417, that it be used for the intended purpose. Similarly it would seem to be compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no difference that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid since both are in furtherance of the national purpose for which the money is appropriated.

These effects upon individual action, which are but incidents of the authorized expenditure of government money, are pronounced to be themselves a limitation upon the granted power, and so the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed. \* \* \*

The spending power of Congress is in addition to the legislative power and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure. \* \* \* If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage

is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition. \* \* \*

Mr. JUSTICE BRANDEIS and Mr. JUSTICE CARDOZO join in this opinion.

#### NOTE

1. A new Agricultural Adjustment Act was passed in 1938 with objectives similar to those in the Act of 1933 but pegged upon the commerce power of the national government rather than its taxing power. This statute was upheld in *Mufford v. Smith*, 307 U. S. 38, 83 L. ed. 1092, 59 Sup. Ct. 648 (1939).

#### STEWART MACHINE CO. v. DAVIS.

Supreme Court of the United States, 1937.

301 U. S. 548, 81 L. ed. 1279, 57 Sup. Ct. 883, 109 A. L. R. 1293.

Mr. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment (\$46.14), asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant, dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. \* \* \* An important question of constitutional law being involved, we granted certiorari.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7 (Supp.)) is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary.

The caption of Title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. Section 901. One is not, however, an "employer" within the meaning of the act unless he employs eight persons or more. Section 907 (a). There are also other limitations of minor importance. The term "employment" too has its special definition, excluding agricultural labor, domestic service in a private home and some other smaller classes. Section 907 (c). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be one per cent, during 1937 two per cent, and three per cent thereafter. The proceeds, when collected, go into the Treasury of the United States like internal-revenue collections generally. Section 905 (a). They are not earmarked in any way. In certain circumstances, how-

ever, credits are allowable. Section 902. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 per centum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. \* \* \* Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end there are provisions that before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." \* \* \* For the moment it is enough to say that the Fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the Fund to any competent state agency such sums as it may duly requisition from the amount standing to its credit. Section 904 (f). \* \* \*

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First: The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. \* \* \* An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as a common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. \* \* \*

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. \* \* \*

Second: The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. \* \* \*

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. \* \* \* The act of Congress is therefore valid, so far at least as its system of exceptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.

Third: The excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. *Cincinnati Soap Co. v. United States*, 301 U. S. 308. No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. *Sonzinsky v. United States*, 300 U. S. 506. This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent credit is relied upon as supporting that conclusion. \* \* \*

[After giving statistics of the large numbers of persons who suffered loss of employment in 1933 to 1936 and of the enormous expenditure, over eight billion dollars, from the federal treasury to give employment on public works and other forms of relief, the opinion continued.]

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a com-

mon evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report, No. 615, 74th Congress, 1st session, p. 8; Senate Report, No. 628, 74th Congress, 1st session, p. 11. Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. *Henneford v. Silas Mason Co.*, 300 U. S. 577; *Kidd v. Alabama*, 188 U. S. 730, 732; *Watson v. State Comptroller*, 254 U. S. 122, 125. If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the co-operating localities ought not in all fairness to pay a second time.

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. See Carmichael v.

Southern Coal & Coke Co., [and] Carmichael v. Gulf States Paper Corp., 301 U.S. 495. For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States*, *supra*. In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. *Beeland Wholesale Co. v. Kaufman*, 234 Ala. 249, 174 So. 516. We think the choice must stand.

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end

legitimately national. The Child Labor Tax Case, 259 U. S. 20, and *Hill v. Wallace*, 259 U. S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States v. Constantine*, 296 U. S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.

*Florida v. Mellon*, 273 U. S. 12, supplies us with a precedent, if precedent be needed. What was in controversy there was section 301 of the Revenue Act of 1926, which imposes a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 per cent, for "the amount of any estate, inheritance, legacy or succession taxes actually paid to any State or Territory." Florida challenged that provision as unlawful. Florida had no inheritance taxes and alleged that under its constitution it could not levy any. 273 U. S. 12, 15. Indeed, by abolishing inheritance taxes, it had hoped to induce wealthy persons to become its citizens. See 67 Cong. Rec., Part 1, pp. 735, 752. It argued at our bar that "the Estate Tax provision was not passed for the purpose of raising federal revenue" (273 U. S. 12, 14), but rather "to coerce States into adopting estate or inheritance tax laws." 273 U. S. 12, 13. In fact, as a result of the 80 per cent credit, material changes of such laws were made in 36 states. In the face of that attack we upheld the act as valid. Cf. *Massachusetts v. Mellon*, 262 U. S. 447, 482; also Act of August 5, 1861, c. 45, 12 Stat. 292; Act of May 13, 1862, c. 66, 12 Stat. 384.

*United States v. Butler*, *supra*, is cited by petitioner as a decision to the contrary. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the act being to increase the prices of certain farm products by decreasing the quantities produced. The court held (1) that the so-called tax was not a true one (pp. 56, 61), the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts (p. 73), unlawful in their aim and oppressive in their consequences. The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

(a) The proceeds of the tax in controversy are not earmarked for a special group.

(b) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

(c) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law (Section 903(a)(6)), terminate the credit, and place itself where it was before the credit was accepted.

(d) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully co-operate.

Fourth: The statute does not call for the surrender by the states of powers essential to their quasi-sovereign existence. \* \* \*

A credit to taxpayers for payments made to a state under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at once or to go into effect later on the basis of subsequent experience. Cf. Sections 909, 910. They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials Congress must have the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. Section 903 (a)

(6). The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. Section 903 (b) (c).

These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

Thus, the argument is made that by force of an agreement the moneys when withdrawn must be "paid through public employment offices in the State or through such other agencies as the Board may approve." Section 903 (a) (1). But in truth there is no agreement as to the method of disbursement. There is only a condition which the state is free at pleasure to disregard or to fulfill. Moreover, approval is not requisite if public employment offices are made the disbursing instruments. Approval is to be a check upon resort to "other agencies" that may, perchance, be irresponsible. A state looking for a credit must give assurance that her system has been organized upon a base of rationality.

There is argument again that the moneys when withdrawn are to be devoted to specific uses, the relief of unemployment, and that by agreement for such payment the quasi-sovereign position of the state has been impaired, if not abandoned. But again there is confusion between promise and condition. Alabama is still free, without breach of an agreement, to change her system overnight. No officer or agency of the national Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments.

Finally and chiefly, abdication is supposed to follow from section 904 of the statute and the parts of section 903 that are complementary thereto. Section 903 (a) (3). By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of Sep-

tember 14, 1935, section 10 (i). The statute may be repealed. Section 903 (a) (6). The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depository that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank. \* \* \*

The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. *Perry v. United States*, 294 U. S. 330, 353; 1 *Oppenheim, International Law*, 4th ed., §§ 493, 494; *Hall, International Law*, 8th ed., § 107; 2 *Hyde, International Law*, § 489. The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. *Constitution*, Art. 1, section 10, par. 3. *Poole v. Fleeger*, 11 Pet. 185-209; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our Federal Constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.

\* \* \*

The judgment is

Affirmed.

[JUSTICE VAN DEVANTER concurred in a dissenting opinion written by JUSTICE SUTHERLAND. JUSTICE BUTLER also delivered a dissenting opinion and JUSTICE McREYNOLDS delivered a separate dissenting opinion.]

#### NOTE

1. A section of the Revenue Act of 1934 which imposed a tax of three cents per pound upon the first processing in continental United States of all coconut oil and provided that the proceeds of the tax so far as it was derived from processing coconut oil produced in the Philippines "shall be held as a separate fund and paid to the Treasury of the Philippine Islands," was sustained in *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 81 L. ed. 1122, 57 Sup. Ct. 764 (1937). Delivering the court's opinion, Mr. Justice Sutherland said: "Plainly, the imposition of the tax in itself is a valid exercise of the taxing power of the federal government. It is purely an excise tax upon a manufacturing process for revenue purposes, and in no sense a regulation of the process itself. \* \* \* Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax qua tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation

made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. The only concern which we have in that aspect of the matter is to determine whether the purpose specified is one for which Congress can make an appropriation without violating the fundamental law." The court concluded that since the United States had an obligation to protect, defend and provide for the general welfare of the inhabitants of the Philippine Islands, a dependency, and such an obligation may well require the appropriation and expenditure of money from the national purse, the law was sustainable "as an act in discharge of a high moral obligation, amounting to a 'debt' within the meaning of the Constitution as it always has been practically construed." *Query*: Could not the statute have been better justified as an exercise of the power to tax to provide for the *common defense* and general welfare of the United States?

### HELVERING v. DAVIS.

Supreme Court of the United States, 1937.

301 U. S. 619, 81 L. ed. 1307, 57 Sup. Ct. 904, 109 A. L. R. 1319.

[Davis, a shareholder in the Edison Electric Illuminating Company of Boston, a Massachusetts corporation, brought a bill in a District Court of the United States to restrain the corporation from paying the taxes imposed by Title VIII of the Social Security Act of August 14, 1935. Helvering, United States Commissioner of Internal Revenue, and Welch, Collector of Internal Revenue, were allowed to intervene. The District Court held that the tax on employees could not be challenged by the corporation or by a shareholder in its behalf and that the tax on employers was constitutional. On appeal the Circuit Court of Appeals reversed, holding that Title II was void on the ground that payment of old age benefits was a power reserved to the states by the Tenth Amendment, and that the invalidity of Title II affected the taxes levied by Title VIII with invalidity. On petition for certiorari, by the Commissioner and the Collector, a review was granted by the Supreme Court.]

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7, (Supp.)) is challenged once again.

In No. 837, *Steward Machine Co. v. Davis*, 301 U. S. 548, decided this day, we have upheld the validity of Title IX of the act, imposing an excise upon employers of eight or more. In this case Titles VIII and II are the subject of attack. Title VIII lays another excise upon employers in addition to the one imposed by Title IX (though with different exemptions). It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for the levy of the taxes imposed by Title VIII. The plan of the two titles will now be summarized more fully.

Title VIII, as we have said, lays two different types of tax, an "income tax on employees," and "an excise tax on employers." The income tax on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid "with respect to having individuals in his employ," and, like the tax on employees, is measured by wages. Section 804. Neither tax is applicable to certain types of employment, such as agricultural labor, domestic service, service for the national or state governments, and service performed by persons who have attained the age of 65 years. Section 811 (b). The two taxes are at the same rate. Sections 801, 804. For the years 1937 to 1939, inclusive, the rate for each tax is fixed at one per cent. Thereafter the rate increases  $\frac{1}{2}$  of 1 per cent every three years, until after December 31, 1948, the rate for each tax reaches 3 per cent. Ibid. In the computation of wages all remuneration is to be included except so much as is in excess of \$3,000 during the calendar year affected. Section 811 (a). The income tax on employees is to be collected by the employer, who is to deduct the amount from the wages "as and when paid." Section 802 (a). He is indemnified against claims and demands of any person by reason of such payment. Ibid. The proceeds of both taxes are to be paid into the Treasury like internal-revenue taxes generally, and are not earmarked in any way. Section 807 (a). There are penalties for non-payment. Section 807 (c).

Title II has the caption "Federal Old-Age Benefits." The benefits are of two types, first, monthly pensions, and second, lump sum payments, the payments of the second class being relatively few and unimportant.

The first section of this title creates an account in the United States Treasury to be known as the "Old-Age Reserve Account." Section 201. No present appropriation, however, is made to that account. All that the statute does is to authorize appropriations annually thereafter, beginning with the fiscal year which ends June 30, 1937. How large they shall be is not known in advance. The "amount sufficient as an annual premium" to provide for the required payments is "to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually." Section 201 (a). Not a dollar goes into the Account by force of the challenged act alone, unaided by acts to follow.

Section 202 and later sections prescribe the form of benefits. The principal type is a monthly pension payable to a person after he has attained the age of 65. This benefit is available only to one who has worked for at least one day in each of at least five separate years since December 31, 1936, who has earned at least \$2,000 since that date, and who is not then receiving wages "with respect to regular

employment." Sections 202 (a), (d), 210 (c). The benefits are not to begin before January 1, 1942. Section 202 (a). In no event are they to exceed \$85 a month. Section 202 (b). They are to be measured (subject to that limit) by a percentage of the wages, the percentage decreasing at stated intervals as the wages become higher. Section 202 (a). \* \* \*

[Here is omitted discussion whether the shareholder's bill in the circumstances was adequate to raise the constitutional issues. A majority of the Court held that it was. JUSTICES BRANDEIS, STONE, ROBERTS and CARDOZO dissented on this point.]

The ruling of the majority removes from the case the preliminary objection as to the nature of the remedy which we took of our own motion at the beginning of the argument. Under the compulsion of that ruling, the merits are now here.

Second: The scheme of benefits created by the provisions of Title II is not in contravention of the limitations of the Tenth Amendment.

Congress may spend money in aid of the "general welfare." Constitution, Art. I, section 8; *United States v. Butler*, 297 U. S. 1, 65; *Steward Machine Co. v. Davis*, supra. There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. *United States v. Butler*, supra. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." *United States v. Butler*, supra, p. 67. Cf. *Cincinnati Soap Co. v. United States*, 301 U. S. 308; *United States v. Realty Co.*, 163 U. S. 427, 440; *Head Money Cases*, 112 U. S. 580, 595. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an ave-

nue of escape. *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 442. Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co.*, supra, has set the doubt at rest. But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups. Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. A great mass of evidence was brought together supporting the policy which finds expression in the act. Among the relevant facts are these: The number of persons in the United States 65 years of age or over is increasing proportionately as well as absolutely. What is even more important the number of such persons unable to take care of themselves is growing at a threatening pace. More and more our population is becoming urban and industrial instead of rural and agricultural. The evidence is impressive that among industrial workers the younger men and women are preferred over the older. In times of retrenchment the older are commonly the first to go, and even if retained, their wages are likely to be lowered. The plight of men and women at so low an age as 40 is hard, almost hopeless, when they are driven to seek for reemployment. \* \* \*

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, has a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. This is brought out with a wealth of illustration in recent studies of the problem. Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. *Steward Machine Co. v. Davis*, supra. A system of old age pensions has special dangers of its own, if put in force in

one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all. \* \* \*

Third: Title II being valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught.

The argument for the respondent is that the provisions of the two titles dovetail in such a way as to justify the conclusion that Congress would have been unwilling to pass one without the other. The argument for petitioners is that the tax moneys are not earmarked, and that Congress is at liberty to spend them as it will. The usual separability clause is embodied in the act. Section 1103.

We find it unnecessary to make a choice between the arguments, and so leave the question open.

Fourth: The tax upon employers is a valid excise or duty upon the relation of employment.

As to this we need not add to our opinion in *Steward Machine Co. v. Davis*, supra, where we considered a like question in respect to Title IX.

Fifth: The tax is not invalid as a result of its exemptions.

Here again the opinion of *Steward Machine Co. v. Davis*, supra, says all that need be said.

Sixth: The decree of the Court of Appeals should be reversed and that of the District Court affirmed. Ordered accordingly.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER are of opinion that the provisions of the Act here challenged are repugnant to the Tenth Amendment, and that the decree of the Circuit Court of Appeals should be affirmed.

### ASHWANDER v. TENNESSEE VALLEY AUTHORITY.

Supreme Court of the United States, 1936.  
297 U. S. 288, 80 L. ed. 688, 56 Sup. Ct. 466.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

On January 4, 1934, the Tennessee Valley Authority, an agency of the Federal Government, entered into a contract with the Alabama Power Company, providing (1) for the purchase by the Authority from the Power Company of certain transmission lines, sub-stations, and auxiliary properties for \$1,000,000, (2) for the purchase by the Authority from the Power Company of certain real property for \$150,000, (3) for an interchange of hydro-electric energy, and in addition for the sale by the Authority to the Power Company of its "surplus power," on stated terms, and (4) for mutual restrictions as to the areas to be served in the sale of power. The contract was

amended and supplemented in minor particulars on February 13 and May 24, 1934.

The Alabama Power Company is a corporation organized under the laws of Alabama and is engaged in the generation of electric energy and its distribution generally throughout that State, its lines reaching 66 counties. The transmission lines to be purchased by the Authority extend from Wilson Dam, at the Muscle Shoals plant owned by the United States on the Tennessee River in northern Alabama, into seven counties in that State, within a radius of about 50 miles. These lines serve a population of approximately 190,000, including about 10,000 individual customers, or about one-tenth of the total number served directly by the Power Company. The real property to be acquired by the Authority (apart from the transmission lines above mentioned and related properties) is adjacent to the area known as the "Joe Wheeler dam site," upon which the Authority is constructing the Wheeler Dam. \* \* \*

The Circuit Court of Appeals limited its discussion to the precise issue with respect to the effect and validity of the contract of January 4, 1934. The District Court had found that the electric energy required for the territory served by the transmission lines to be purchased under that contract is available at Wilson Dam without the necessity for any interconnection with any other dam or power plant. The Circuit Court of Appeals accordingly considered the constitutional authority for the construction of Wilson Dam and for the disposition of the electric energy there created. In the view that the Wilson Dam had been constructed in the exercise of the war and commerce powers of the Congress and that the electric energy there available was the property of the United States and subject to its disposition, the Circuit Court of Appeals decided that the decree of the District Court was erroneous and should be reversed. The Court also held that plaintiffs should take nothing by their cross appeal. 78 F. (2d) 578. On plaintiff's application we granted writs of certiorari.

First. The right of plaintiffs to bring this suit. [A majority of the Court held that the plaintiffs as shareholders of the Alabama Power Company had shown the prerequisites of a shareholder's bill and might sue in the right of the company and that the constitutional issue was thus properly presented.]

Second. The scope of the issue. We agree with the Circuit Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934. The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. \* \* \*

There is a further limitation upon our inquiry. As it appears that the transmission lines in question run from the Wilson Dam and that the electric energy generated at that dam is more than sufficient to supply all the requirements of the contract, the questions that are properly before us relate to the constitutional authority for the construction of the Wilson Dam and for the disposition, as provided in the contract, of the electric energy there generated.

Third. The constitutional authority for the construction of the Wilson Dam. The Congress may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government." Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 423; *Linder v. United States*, 268 U. S. 5, 17. The Government's argument recognizes this essential limitation. The Government's contention is that the Wilson Dam was constructed, and the power plant connected with it was installed, in the exercise by the Congress of its war and commerce powers, that is, for the purposes of national defense and the improvement of navigation.

Wilson Dam is described as a concrete monolith one hundred feet high and almost a mile long, containing two locks for navigation and eight installed generators. Construction was begun in 1917 and completed in 1926. Authority for its construction is found in § 124 of the National Defense Act of June 3, 1916. It authorized the President to cause an investigation to be made in order to determine "the best, cheapest, and most available means for the production of nitrates and other products for munitions of war"; to designate for the exclusive use of the United States "such site or sites upon any navigable or non-navigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act"; and "to construct, maintain and operate" on any such site "dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products." The President was authorized to lease, or acquire by condemnation or otherwise such lands as might be necessary and there was further provision that "The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe." *Id.*

We may take judicial notice of the international situation at the time the Act of 1916 was passed, and it cannot be successfully disputed that the Wilson Dam and its auxiliary plants including the hydro-

electric power plant, are, and were intended to be, adapted to the purposes of national defense. While the District Court found that there is no intention to use the nitrate plants or the hydro-electric units installed at Wilson Dam for the production of war materials in time of peace, "the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war, constitute national defense assets." This finding has ample support.

The Act of 1916 also had in view "improvements to navigation." Commerce includes navigation. "All America understands, and has uniformly understood," said Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 190, "the word 'commerce,' to comprehend navigation." The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstructions to navigation and to remove such obstructions when they exist. "For these purposes," said the Court in *Gilman v. Philadelphia*, 3 Wall. 713, 725, "Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." See, also, *Philadelphia Company v. Stimson*, 223 U. S. 605, 634.

The Tennessee River is a navigable stream, although there are obstructions at various points because of shoals, reefs and rapids. The improvement of navigation on this river has been a matter of national concern for over a century. \* \* \*

While, in its present condition, the Tennessee River is not adequately improved for commercial navigation, the traffic is small, we are not at liberty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end.

The Wilson Dam and its power plant must be taken to have been constructed in the exercise of the constitutional functions of the Federal Government.

Fourth. The constitutional authority to dispose of electric energy generated at the Wilson Dam. The Government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. The water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the water power, the right to convert it into electric energy, and the electric energy thus produced, constitute property belonging to the United States. See *Green Bay Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 80; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 72, 73; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 170.

Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by § 3 of Article IV of the Constitution. This section provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment (which petitioners also invoke) in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations which render invalid the disposition of property with which we are now concerned.

The occasion for the grant was the obvious necessity of making provisions for the government of the vast territory acquired by the United States. The power to govern and to dispose of that territory was deemed to be indispensable to the purposes of the cessions made by the States. And yet it was a matter of grave concern because of the fear that "the sale and disposal" might become "a source of such immense revenue to the national government, as to make it independent of and formidable to the people." Story on the Constitution, §§ 1325, 1326. The grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to "other property belonging to the United States," so that the power may be applied, as Story says, "to the due regulation of all other personal and real property rightfully belonging to the United States." And so, he adds, "it has been constantly understood and acted upon." *Id.*

This power of disposal was early construed to embrace leases, thus enabling the Government to derive profit through royalties. The question arose with respect to a government lease of lead mines on public lands, under the Act of March 3, 1807. The contention was advanced that "disposal is not letting or leasing"; that Congress had no power "to give or authorize leases" and "to obtain profits from the working of the mines." The Court overruled the contention, saying: "The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument." *United States v. Gratiot*, 14 Pet. 526, 533, 538. The policy, early adopted and steadily pursued, of segregating mineral lands from other public lands and providing for leases, pointed to the recognition both of the full power of dis-

posal and of the necessity of suitably adapting the methods of disposal to different sorts of property. \* \* \*

But when Congress thus reserved mineral lands for special disposal, can it be doubted that Congress could have provided for mining directly by its own agents, instead of giving that right to lessees on the payment of royalties? Upon what ground could it be said that the Government could not mine its own gold, silver, coal, lead, or phosphates in the public domain, and dispose of them as property belonging to the United States? That it could dispose of its land but not of what the land contained? It would seem to be clear that under the same power of disposition which enabled the Government to lease and obtain profit from sales by its lessees, it could mine and obtain profit from its own sales.

The question is whether a more limited power of disposal should be applied to the water power, convertible into electric energy, and to the electric energy thus produced at the Wilson Dam constructed by the Government in the exercise of its constitutional functions. If so, it must be by reason either of (1) the nature of the particular property, or (2) the character of the "surplus" disposed of, or (3) the manner of disposition.

(1) That the water power and the electric energy generated at the dam are susceptible of disposition as property belonging to the United States is well established. \* \* \*

(2) The argument is stressed that, assuming that electric energy generated at the dam belongs to the United States, the Congress has authority to dispose of this energy only to the extent that it is a surplus necessarily created in the course of making munitions of war or operating the works for navigation purposes; that is, that the remainder of the available energy must be lost or go to waste. We find nothing in the Constitution which imposes such a limitation. It is not to be deduced from the mere fact that the electric energy is only potentially available until the generators are operated. The Government has no less right to the energy thus available by letting the water course over its turbines than it has to use the appropriate processes to reduce to possession other property within its control, as, for example, oil which it may recover from a pool beneath its lands, and which is reduced to possession by boring oil wells and otherwise might escape its grasp. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 208. And it would hardly be contended that, when the Government reserves coal on its lands, it can mine the coal and dispose of it only for the purpose of heating public buildings or for other governmental operations. Or, if the Government owns a silver mine, that it can obtain the silver only for the purpose of storage or coinage. Or, that when the Government extracts the oil it has reserved, it has no constitutional power to sell it. Our decisions recognize no such restriction. United States

v. Gratiot, 14 Pet. 526; *Kansas v. Colorado*, 206 U. S. 46, 88, 89; *Light v. United States*, 220 U. S. 523, 536, 537; *Ruddy v. Rossi*, 248 U. S. 104, 106. The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose.

We think that the same principle is applicable to electric energy. The argument pressed upon us leads to absurd consequences in the denial, despite the broad terms of the constitutional provision, of a power of disposal which the public interest may imperatively require. Suppose, for example, that in the erection of a dam for the improvement of navigation, it became necessary to destroy a dam and power plant which had previously been erected by a private corporation engaged in the generation and distribution of energy which supplied the needs of neighboring communities and business enterprises. Would anyone say that, because the United States had built its own dam and plant in the exercise of its constitutional functions, and had complete ownership and dominion over both, no power could be supplied to the communities and enterprises dependent on it, not because of any unwillingness of the Congress to supply it, or of any overriding governmental need, but because there was no constitutional authority to furnish the supply? Or that, with abundant power available, which must otherwise be wasted, the supply to the communities and enterprises whose very life may be at stake must be limited to the slender amount of surplus unavoidably involved in the operation of the navigation works, because the Constitution does not permit any more energy to be generated and distributed? In the case of the *Green Bay Canal Co.*, above cited, where the government works supplanted those of the Canal Company, the Court found no difficulty in sustaining the Government's authority to grant to the Canal Company the water powers which it had previously enjoyed, subject, of course, to the dominant control of the Government. And in the case of *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, the statutory provision, to which the Court referred, was "that any excess of water in the St. Marys River at Sault Sainte Marie over and above the amount now or hereafter required for the uses of navigation shall be leased for power purposes by the Secretary of War upon such terms and conditions as shall be best calculated in his judgment to insure the development thereof." It was to the leasing, under this provision, "of any excess of power over the needs of the Government" that the Court saw no valid objection. *Id.*, p. 73. \* \* \*

(3) We come then to the question as to the validity of the method which has been adopted in disposing of the surplus energy generated at the Wilson Dam. The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition

according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States. See *Kansas v. Colorado*, supra. In this instance, the method of disposal embraces the sale of surplus energy by the Tennessee Valley Authority to the Alabama Power Company, the interchange of energy between the Authority and the Power Company, and the purchase by the Authority from the Power Company of certain transmission lines.

As to the mere sale of surplus energy, nothing need be added to what we have said as to the constitutional authority to dispose. The Government could lease or sell and fix the terms. Sales of surplus energy to the Power Company by the Authority continued a practice begun by the Government several years before. The contemplated interchange of energy is a form of disposition and presents no questions which are essentially different from those that are pertinent to sales.

The transmission lines which the Authority undertakes to purchase from the Power Company lead from the Wilson Dam to a large area within about fifty miles of the dam. These lines provide the means of distributing the electric energy, generated at the dam, to a large population. They furnish a method of reaching a market. The alternative method is to sell the surplus energy at the dam, and the market there appears to be limited to one purchaser, the Alabama Power Company, and its affiliated interests. We know of no constitutional ground upon which the Federal Government can be denied the right to seek a wider market. We suppose that in the early days of mining in the West, if the Government had undertaken to operate a silver mine on its domain, it could have acquired the mules or horses and equipment to carry its silver to market. And the transmission lines for electric energy are but a facility for conveying to market that particular sort of property, and the acquisition of these lines raises no different constitutional question, unless in some way there is an invasion of the rights reserved to the State or to the people. We find no basis for concluding that the limited undertaking with the Alabama Power Company amounts to such an invasion. Certainly, the Alabama Power Company has no constitutional right to insist that it shall be the sole purchaser of the energy generated at the Wilson Dam; that the energy shall be sold to it or go to waste.

We limit our decision to the case before us, as we have defined it. The argument is earnestly presented that the Government by virtue of its ownership of the dam and power plant could not establish a steel mill and make and sell steel products, or a factory to manufacture clothing or shoes for the public, and thus attempt to make its ownership of energy, generated at its dam, a means of carrying on

competitive commercial enterprises and thus drawing to the Federal Government the conduct and management of business having no relation to the purposes for which the Federal Government was established. The picture is eloquently drawn but we deem it to be irrelevant to the issue here. The Government is not using the water power at the Wilson Dam to establish any industry or business. It is not using the energy generated at the dam to manufacture commodities of any sort for the public. The Government is disposing of the energy itself which simply is the mechanical energy, incidental to falling water at the dam, converted into the electric energy which is susceptible of transmission. The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. As we have said, these transmission lines lead directly from the dam, which has been lawfully constructed, and the question of the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of the Authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Company.

The decree of the Circuit Court of Appeals is Affirmed.

[MR. JUSTICE BRANDEIS delivered a separate opinion, in which JUSTICES STONE, ROBERTS and CARDOZO concurred, saying, "I do not disagree with the conclusion on the constitutional question announced by the Chief Justice; but, in my opinion, the judgment of the Circuit Court of Appeals should be affirmed without passing on it,"—on the ground that in his opinion the shareholder's bill in the circumstances was not appropriate to raise the constitutional issue.]

Separate opinion of MR. JUSTICE McREYNOLDS.

Considering the consistent rulings of this court through many years, it is not difficult for me to conclude that petitioners have presented a justiciable controversy which we must decide. \* \* \*

Nor do I find serious difficulty with the notion that the United States, by proper means and for legitimate ends, may dispose of water power or electricity honestly developed in connection with permissible improvements of navigable waters. But the means employed to that end must be reasonably appropriate in the circumstances. Under pretense of exercising granted power, they may not in fact undertake something not intrusted to them. \* \* \*

The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power throughout certain large districts, to expel the power companies which had long serviced them, and to control the market therein. A government instrumentality had entered upon a pretentious scheme to provide a "yardstick" of the fairness of rates charged by private owners, and to attain "no less a goal than the electrification of America." "When we carry this program into every town and city and village, and every farm throughout the country, we will have written the greatest chapter in the economic, industrial and social development of America." Any reasonable doubt concerning the purpose and result of the Contract of January 4th or of the design of the Authority should be dispelled by examination of its Reports for 1934 and 1935. \* \* \*

As matter of law the trial court found—

"The function intended by TVA under the evidence in relation to service, utility in type, in the area ceded by the contract of January 4, 1934, transcends the function of conservation or disposition of government property, involves continuing service and commercial functions by the government to fill contracts not governmental in origin or character." \* \* \*

"Congress has no constitutional authority to authorize Tennessee Valley Authority or any other federal agency to undertake the operation, essentially permanent in character, of a utility system, for profit, involving the generation, transmission and commercial distribution of electricity within State domain, having no reasonable relation to a lawful governmental use."

I think the trial court reached the correct conclusion and that its decree should be approved. If under the thin mask of disposing of property the United States can enter the business of generating, transmitting and selling power as, when and wherever some board may specify, with the definite design to accomplish ends wholly beyond the sphere marked out for them by the Constitution, an easy way has been found for breaking down the limitations heretofore supposed to guarantee protection against aggression.

#### NOTES

1. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 83 L. ed. 543, 59 Sup. Ct. 366 (1939) a number of private electric power companies suing to enjoin the generation and distribution of power by the Authority in competition with the plaintiffs were held not proper parties in interest to raise the issue of constitutionality, since they had no right to be free from competition. In an earlier case the court had reached the same result in a suit by utility companies to enjoin the making of loans and grants by the Public Works Administration to municipalities for the construction of their own electricity distribution systems. Not holding exclusive franchises, they had no standing in court to raise the constitutional question. *Alabama Power Co. v. Ickes*, 302 U. S. 464, 82 L. ed. 374, 58 Sup. Ct. 300 (1938).

2. In *United States v. Gratiot*, 14 Pet. 526, 537, 10 L. ed. 573 (1840) the Supreme Court said that the power under the Constitution (Art. IV, § 3, cl. 2) to dispose of property belonging to the United States "is vested in Congress without limitation." This fact has been strikingly emphasized by the recent refusal of the court to permit the States of Alabama and Rhode Island to file complaints against the States of Texas and Louisiana, respectively, challenging the validity of the Submerged Lands Act of 1953. In a per curiam opinion the court said that since the power was without limitation it was not for the courts to say how that trust should be administered. (Justices Black and Douglas dissented on the ground that the power of Congress to enact the challenged statute was subject to sufficient doubt to require that the complainant states be given full opportunity to present their contentions.) *Alabama v. Texas*; *Rhode Island v. Louisiana*, 347 U. S. 272, 98 L. ed. 689, 74 Sup. Ct. 481 (1954).

### Section 3.—The War Powers.

#### SELECTIVE DRAFT LAW CASES.

Supreme Court of the United States, 1918.  
245 U. S. 366, 62 L. ed. 349, 38 Sup. Ct. 159.

[Error to the United States District Courts for the district of Minnesota and the southern district of New York. Under the Act of May 18, 1917, 40 Stat. 76, Congress provided that all male citizens between the ages of 21 and 30, with certain exceptions, should be subject to military service and authorized the President to select from them a national army of one million men. All persons made liable to service by the Act were required to present themselves at a time appointed by the President for registration. The plaintiffs in error failed to present themselves as required and were prosecuted and convicted for violation of the Act. They sued out writs of error, contending that Congress had no power to compel military service by a selective draft.]

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court.  
\* \* \*

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; \* \* \* to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; \* \* \* to make rules for the government and regulation of the land and naval forces." Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, § 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further

notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and the United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. \* \* \* In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This, however, but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it. Vattel, *Law of Nations*, book III, chaps. 1 and 2. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force. In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, book I, chap. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform

military duty wherever the public exigency exacted whether at home or abroad. This is exemplified by the present English Service Act.

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the government contains a list of Colonial Acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army, each state being bound for its quota as called. But it is indisputable that the states in response to the calls made upon them met the situation when they deemed it necessary by direct- ing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the Con- stitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Article 8 (5 Thorpe, *American Charters, Constitutions and Organic Laws*, pp. 3081, 3083). While it is true that the states were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the states to resort to drafts to fill their quotas—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10.

To argue that as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. \* \* \*

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

"The Congress shall have power \* \* \* To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Article I, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the States for forces and the duty on the other of the States to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the States on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in whole or in part into play. There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exercise by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States. It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such purposes although subjecting the

militia when so called to the paramount authority of the United States. *Tarble's Case*, 13 Wall. 397, 408. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confusing the two areas which were distinct and separate to the end of confounding both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. \* \* \*

Thus, sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. *Kneedler v. Lane*, 45 Pa. 238. And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding States wrote into the Constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. \* \* \*

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme

and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement. Affirmed.

## NOTES

1. Congress may provide for enlistment in the armed services on such terms as it deems expedient, and may require military service of minors as well as adults, thus superseding the control of parents over their minor children. *United States v. Williams*, 302 U. S. 46, 82 L. ed. 39, 58 Sup. Ct. 81 (1937). Cases dealing with the administration of the Selective Training and Service Act of 1940 are: *Billings v. Truesdell*, 321 U. S. 542, 88 L. ed. 917, 64 Sup. Ct. 737 (1944); *Falbo v. United States*, 320 U. S. 549, 88 L. ed. 305, 64 Sup. Ct. 346 (1944); *Estep v. United States*, 327 U. S. 114, 90 L. ed. 567, 66 Sup. Ct. 423 (1946); *Cox v. United States*, 332 U. S. 442, 92 L. ed. 59, 68 Sup. Ct. 115 (1947). See also, *Freeman, The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40 (1944); *Montgomery, The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Universal Military Training*, 31 Va. L. Rev. 628 (1945).

2. *Prize Cases*, 2 Black 635, 17 L. ed. 459 (1863) sustained the power of the President to declare a blockade of the ports of the Confederate States upon the outbreak of the Civil War and before Congress had assembled and taken action. Mr. Justice Grier, for the court, said: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be *'unilateral'*." For a discussion of these cases see *Swisher, American Constitutional Development* (1943), 295-299. On the war powers of the President see *Berdahl, War Powers of the Executive in the United States* (1920); *Randall, Constitutional Problems Under Lincoln* (1926).

3. State militia forces are not part of the armed forces of the United States but they may be called into the service of the national government "to execute the laws of the Union, suppress insurrections and repel invasions" (Const., Art. I, § 8, cl. 15). The Constitution gives this power to Congress but it has been vested by legislation in the President. *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537 (1827) held that a determination by the President that an emergency has arisen justifying the calling forth of the militia is not open to question in the courts, the Supreme Court saying: "We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons."

## BURNS v. WILSON.

Supreme Court of the United States, 1953.  
346 U. S. 137, 97 L. ed. 1508, 73 Sup. Ct. 1045.

MR. CHIEF JUSTICE VINSON announced the judgment of the Court in an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE CLARK join.

Tried separately by Army courts-martial on the Island of Guam, petitioners were found guilty of murder and rape and sentenced to death. The sentences were confirmed by the President, and petitioners exhausted all remedies available to them under the Articles of War for review of their convictions by the military tribunals. They then filed petitions for writs of habeas corpus in the United States District Court for the District of Columbia.

In these applications petitioners alleged that they had been denied due process of law in the proceedings which led to their conviction by the courts-martial. They charged that they had been subjected to illegal detention; that coerced confessions had been extorted from them; that they had been denied counsel of their choice and denied effective representation; that the military authorities on Guam had suppressed evidence favorable to them, procured perjured testimony against them and otherwise interfered with the preparation of their defenses. Finally, petitioners charged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play.

The District Court dismissed the applications without hearing evidence, and without further review, after satisfying itself that the courts-martial which tried petitioners had jurisdiction over their persons at the time of the trial and jurisdiction over the crimes with which they were charged as well as jurisdiction to impose the sentences which petitioners received. *Dennis v. Lovett*, 104 F. Supp. 310. The Court of Appeals affirmed the District Court's judgment, after expanding the scope of review by giving petitioners' allegations full consideration on their merits, reviewing in detail the mass of evidence to be found in the transcripts of the trial and other proceedings before the military court. *Burns v. Lovett*, 91 U. S. App. D. C. 208, 202 F. 2d 335.

We granted certiorari, 344 U. S. 903. Petitioners' allegations are serious, and, as reflected by the divergent bases for decision in the two courts below, the case poses important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial in a habeas corpus proceeding.

In this case, we are dealing with habeas corpus applicants who assert—rightly or wrongly—that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution. The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power. Accordingly, our initial concern is not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power.

The statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the appli-

cations of persons confined by the civil courts. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. *Hiatt v. Brown*, 339 U. S. 103. Thus the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is *sui generis*; it must be so, because of the peculiar relationship between the civil and military law.

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights. Only recently the Articles of War were completely revised, and thereafter, in conformity with its purpose to integrate the armed services, Congress established a Uniform Code of Military Justice applicable to all members of the military establishment. These enactments were prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II. Nor was this a patchwork effort to plug loopholes in the old system of military justice. The revised Articles of the new Code are the result of painstaking study; they reflect an effort to reform and modernize the system—from top to bottom.

Rigorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense. The revised Articles, and their successor—the new Code—also establish a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services. And finally Congress has provided a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial, may attack collaterally the judgment under which he stands convicted.

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statu-

tory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are “final” and “binding” upon all courts. We have held before that this does not displace the civil courts’ jurisdiction over an application for habeas corpus from the military prisoner. *Gusik v. Schilder*, 340 U. S. 128. But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. *Whelchel v. McDonald*, 340 U. S. 122.

We turn, then, to this case.

Petitioners’ applications, as has been noted, set forth serious charges—allegations which, in their cumulative effect, were sufficient to depict fundamental unfairness in the process whereby their guilt was determined and their death sentences rendered. Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

Petitioners asserted: they had been arrested and confined incomunicado by officers of the military government of Guam; they were mistreated and subjected to continuous questioning without being informed of their rights; petitioner Dennis finally confessed, after police officers confronted him with the confession of Calvin Dennis—an alleged accomplice in the crime; after a period of about three weeks of this confinement, the petitioners were turned over to the Air Force; the military authorities “planted” real evidence—the victim’s smock with hairs from petitioners’ body attached—in a truck which petitioners had driven on the night of the crime; they further sought to “contrive” a conviction by coercing various witnesses to testify against petitioners; both petitioners were denied the benefit of counsel until a short while before trial, and petitioner Dennis was denied representation of his choice when counsel he sought was removed from the case by the commanding officer of his unit; the trial was conducted in an atmosphere of “hysteria” because the crime had been particularly brutal and the authorities had “created” a demand for vengeance; the “coerced” confessions were admitted at the trial and so was the incriminating confession of Calvin Dennis—which had been procured by threats and deceit.

Answering the habeas corpus applications, respondents denied that there had been any violation of petitioners’ rights and attached to their

answer copies of the record of each trial, the review of the Staff Judge Advocate, the decision of the Board of Review in the office of the Judge Advocate General, the decision (after briefs and oral argument) of the Judicial Council in the Judge Advocate General's office, the recommendation of the Judge Advocate General, the action of the President confirming the sentences, and also the decision of the Judge Advocate General denying petitions for new trials under Article 53 of the Articles of War.

These records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process—to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. *Whelchel v. McDonald*, *supra*. We think they have.

The military reviewing courts scrutinized the trial records before rejecting petitioners' contentions. In lengthy opinions, they concluded that petitioners had been accorded a complete opportunity to establish the authenticity of their allegations, and had failed. Thus, the trial records were analyzed to show that the circumstances fully justified the decision to remove Dennis' original choice of defense counsel; that each petitioner had declared, at the beginning of his trial, that he was ready to proceed; that each was ably represented; that the trials proceeded in an orderly fashion—with that calm degree of dispassion essential to a fair hearing on the question of guilt; that there was exhaustive inquiry into the background of the confessions—with the taking of testimony from the persons most concerned with the making of these statements, including petitioner Dennis who elected to take the stand. And finally it was demonstrated that the issues arising from the charges relating to the use of perjured testimony and planted evidence were either explored or were available for exploration at the trial.

Petitioners have failed to show that this military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove *de novo* in the District Court precisely the case which they failed to prove in the military courts. We think, under the circumstances, that due regard for the limitations on a civil court's power to grant such relief precludes such action. We think that although the Court of Appeals may have erred in reweighing each item of relevant evidence in the trial record, it certainly did not err in holding that there was no need for a further hearing in the District Court. Accordingly its judgment must be affirmed.

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE MINTON, concurring in the affirmance of the judgment.

I do not agree that the federal civil courts sit to protect the constitutional rights of military defendants, except to the limited extent indicated below. Their rights are committed by the Constitution and by Congress acting in pursuance thereof to the protection of the military courts, with review in some instances by the President. Nor do we sit to review errors of law committed by military courts.

This grant to set up military courts is as distinct as the grant to set up civil courts. Congress has acted to implement both grants. Each hierarchy of courts is distinct from the other. We have no supervisory power over the administration of military justice, such as we have over civil justice in the federal courts. Due process of law for military personnel is what Congress has provided for them in the military hierarchy in courts established according to law. If the court is thus established, its action is not reviewable here. Such military court's jurisdiction is exclusive but for the exceptions contained in the statute, and the civil courts are not mentioned in the exceptions. 64 Stat. 115, 50 U. S. C. (Supp. V) § 581 [F. C. A. 50 § 581].

If error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of courts provided by Congress. We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction. \* \* \*

With this understanding, I concur in affirming the judgment.

MR. JUSTICE FRANKFURTER. \* \* \*

I cannot agree that the only inquiry that is open on an application for habeas corpus challenging a sentence of a military tribunal is whether that tribunal was legally constituted and had jurisdiction, technically speaking, over the person and the crime. Again, I cannot agree that the scope of inquiry is the same as that open to us on review of State convictions; the content of due process in civil trials does not control what is due process in military trials. Nor is the duty of the civil courts upon habeas corpus met simply when it is found that the military sentence has been reviewed by the military hierarchy, although in a debatable situation we should no doubt attach more weight to the conclusions reached on controversial facts by military appellate courts than to those reached by the highest court of a State.

In the light of these considerations I cannot assume the responsibility, where life is at stake, of concurring in the judgment of the Court. Equally, however, I would not feel justified in reversing the judgment. My duty, as I see it, is to resolve the dilemma by doing neither. It is my view that this is not just a case involving individuals. Issues of far-reaching import are at stake which call for further consideration. They were not explored in all their significance in the submissions made to the Court. While this case arose prior to the new Code of

Military Justice, 64 Stat. 107, it necessarily will have a strong bearing upon the relations of the civil courts to the new Court of Military Appeals. The short of it is that I believe this case should be set down for reargument.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting. \* \* \*

I think petitioners are entitled to a judicial hearing on the circumstances surrounding their confessions. \* \* \*

Of course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. That is the meaning of *Ex parte Quirin*, 317 U. S. 1, holding that indictment by grand jury and trial by jury are not constitutional requirements for trials before military commissions. Nor do the courts sit in review of the weight of the evidence before the military tribunal. \* \* \* But never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces. I think it plain from the text of the Fifth Amendment that that position is untenable. \* \* \*

What reason is there for making one specific exception for cases arising in the land or naval forces or in the militia if none of the Fifth Amendment is applicable to military trials? Since the requirement for indictment before trial is the only provision of the Fifth Amendment made inapplicable to military trials, it seems to me clear that the other relevant requirements of the Fifth Amendment (including the ban on coerced confessions) are applicable to them. And if the ban on coerced confessions is applicable, how can it mean one thing in civil trials and another in military trials?

The prohibition against double jeopardy is one of those provisions. And consistently with the construction I urge, we held in *Wade v. Hunter*, 336 U. S. 684, 690, that court-martial action was subject to that requirement of the Fifth Amendment. The mandates that no person be compelled to be a witness against himself or be deprived of life or liberty without due process of law are as specific and as clear. They too, as the Court of Appeals held, are constitutional requirements binding on military tribunals.

If a prisoner is coerced by torture or other methods to give the evidence against him, if he is beaten or slowly "broken" by third-degree methods, then the "trial" before the military tribunal becomes an empty ritual. The real trial takes place in secret where the accused without benefit of counsel succumbs to physical or psychological pressures. A soldier or sailor convicted in that manner has been denied due process of law; and, like the accused in criminal cases \* \* \* should have relief by way of habeas corpus.

The opinion of the Court is not necessarily opposed to this view. But the Court gives binding effect to the ruling of the military tribunal

on the constitutional question, provided it has given fair consideration to it.

If the military agency has fairly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate.

The *undisputed* facts in this case make a *prima facie* case that our rule on coerced confessions expressed in *Watts v. Indiana*, 338 U. S. 49, was violated here. No court has considered the question whether repetitious questioning over a period of five days while the accused was held incommunicado without benefit of counsel violated the Fifth Amendment. \* \* \*

#### NOTES

1. In *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838 (1858) it was said: "With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. \* \* \* But we repeat, if a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress." A recent decision exemplifying the limited scope of judicial review upon habeas corpus of court-martial proceedings is *Hiatt v. Brown*, 339 U. S. 103, 94 L. ed. 691, 70 Sup. Ct. 495 (1950). See also, *Whelchel v. McDonald*, 340 U. S. 122, 95 L. ed. 141, 71 Sup. Ct. 146 (1950); *Gusik v. Schilder*, 340 U. S. 128, 95 L. ed. 146, 71 Sup. Ct. 149 (1950).

2. Petitioner, who had entered the American Zone of Occupied Germany as the dependent wife of a member of the United States Air Force, was convicted in an occupation court in Germany of having murdered her husband in violation of the German Criminal Code. The occupation court was organized under the authority of the President as Commander-in-Chief of the Armed Forces occupying Germany. Petitioner brought habeas corpus on the ground that the court had no jurisdiction. The Supreme Court, in an opinion by Mr. Justice Burton, held that the occupation court, as a tribunal in the nature of a military commission, had jurisdiction to try petitioner, and that this jurisdiction was not affected by the fact that under the Articles of War a court-martial had concurrent jurisdiction, nor by the fact that before the commission of the crime an occupation statute took effect under which the President vested the authority of the Military Government in a civilian under the control of the Department of State rather than the Department of Defense. Mr. Justice Black dissented on the ground that, if American citizens in Germany are to be tried by the American Government, they should be tried under laws passed, and in courts created, by Congress under its Constitutional authority. *Madsen v. Kinsella*, 343 U. S. 341, 96 L. ed. 988, 72 Sup. Ct. 699 (1952).

## EX PARTE QUIRIN.

Supreme Court of the United States, 1942.  
317 U. S. 1, 87 L. ed. 3, 63 Sup. Ct. 2.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court, and by their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, 47 F. Supp. 431, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this Court petitions for certiorari to the Court of Appeals before judgment, pursuant to Section 240(a) of the Judicial Code, 28 U. S. C. § 347(a) [F. C. A. 28 § 347(a)]. We granted certiorari before judgment for the reasons which moved us to convene the special term of Court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this Court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion, 317 U. S. 1, we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. \* \* \* For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the

German High Command, who had instructed them to wear their German uniforms while landing in the United States.

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation, the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States \* \* \* through coastal or boundary defenses, and are charged with committing or attempting to or preparing to commit sabotage, espionage, hostile or war-like acts, or violations of the law of war, shall be subject to the law of war and to the jurisdictions of military tribunals."

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally. \* \* \*

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments

guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority. \* \* \*

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan* [4 Wall. 2]. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. \* \* \* Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled

to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. \* \* \*

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war." \* \* \*

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation. \* \* \*

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates v. Goodloe*, 101 U. S. 612, 615, 617, 618. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused. \* \* \*

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. \* \* \*

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U. S. 126; cf. *Williams v. United States*, 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia v. Colts*, 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which

it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan v. Wilson*, 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick v. United States*, 195 U. S. 65; *District of Columbia v. Clawans*, 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry*, 128 U. S. 289, 302, 304; *Savin, Petitioner*, 131 U. S. 267, 277; *In re Debs*, 158 U. S. 564, 594-596; *United States v. Shipp*, 203 U. S. 563, 572; *Blackmer v. United States*, 284 U. S. 421, 440; *Nye v. United States*, 313 U. S. 33, 48; see *United States v. Hudson and Goodwin*, 7 Cranch 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States v. Zucker*, 161 U. S. 475; *United States v. Regan*, 232 U. S. 37, and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2 or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions." In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan*, supra, 4 Wall. 123, 138, 139. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land \* \* \* forces," when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither with-

in the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. \* \* \*

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776, imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court-martial." This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our government, and is now continued in the 82nd Article of War. Such a construction is entitled to the greatest respect. *Stuart v. Laird*, 1 Cranch, 299, 309; *Field v. Clark*, 143 U. S. 649, 691; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 328. It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason*, 105 U. S. 696; *Kahn v. Anderson*, 255 U. S. 1, 8, 9; cf. *Caldwell v. Parker*, 252 U. S. 376.

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by

death. It is equally inadmissible to construe the Amendments—whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, 4 Wall. page 121, that the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.” Elsewhere in its opinion, 4 Wall. at pages 118, 121, 122, and 131, the Court was at pains to point out that *Milligan*, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court’s statement as to the inapplicability of the law of war to *Milligan*’s case as having particular reference to the facts before it. From them the Court concluded that *Milligan*, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

The Court’s opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission. \* \* \*

MR. JUSTICE MURPHY took no part in the consideration or decision of these cases.

Orders of the District Court affirmed and leave to file petitions for habeas corpus in the Supreme Court denied.

## NOTES

1. The Constitution (Art. I, § 9, cl. 2) provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." President Lincoln suspended the writ by executive proclamation in 1861. In *Ex parte Merryman*, Fed. Cas. No. 9,487 (1861) Chief Justice Taney of the Supreme Court expressed the opinion that Congress alone possessed this power under the Constitution, and his view has been generally accepted as correct, although Lincoln's position was defended by leading Constitutional lawyers of his day. Later, in 1863, Congress authorized the President to suspend the writ whenever in his judgment the public safety might require it. In the famous case of *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281 (1866), discussed in the principal case, a majority of the Supreme Court, in an opinion by Mr. Justice Davis, held that in a state where the civil courts were in full operation and the federal government was unopposed, trial by a military commission could not legally be substituted for civil trial. Four justices were unwilling to go this far. Speaking for this group, Chief Justice Chase agreed that since Congress had not in fact made provision for the military tribunal in question and the trial had taken place in a locality where no hostilities were being carried on, the defendant was entitled to be released. But the minority justices took the position that Congress was not without power to deal with emergency situations of this sort. They said: "Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety." For the historical background of the *Milligan* case and analysis of the issues involved, consult 3 Warren, *The Supreme Court in United States History* (1922), ch. 29; Swisher, *American Constitutional Development* (1943), 285-289; Klaus, *The Milligan Case* (1929); Fairman, *The Law of Martial Rule* (2d ed. 1942); Randall, *Constitutional Problems Under Lincoln* (1926).

2. After the attack on Pearl Harbor the Governor of Hawaii suspended the writ of habeas corpus and placed the territory under martial law, calling upon the commanding general to exercise the powers normally exercised by the Governor and by the judicial officers of the territory. Section 67 of the Hawaiian Organic Act authorized the Governor to take this action in case of rebellion or invasion, or imminent danger thereof, when the public safety required it. Pursuant to this authorization the commanding general established military tribunals to take the place of the courts. These were to try civilians charged with violating the laws of the United States and of the territory and the rules and regulations of the military government. Rules of evidence and ordinary court procedure were not to control military trials. Punishments were to be "commensurate with the offense committed" and the death penalty might be imposed "in appropriate cases." Thus the military authorities virtually took over the government of Hawaii. In *Duncan v. Kahanamoku* and *White v. Steer*, 327 U. S. 304, 90 L. ed. 688, 66 Sup. Ct. 606 (1946) the two defendants had been tried by military tribunals, without juries, without receiving written charges and without adequate time to prepare their defenses. Duncan was a civilian shipfitter employed in the Navy Yard at Honolulu. More than two years after Pearl Harbor he engaged in a brawl with two armed Marine sentries, was arrested by the military authorities, charged with assault, tried by a military tribunal, convicted and sentenced to six months imprisonment. White, a stockbroker, was charged with embezzling stock belonging to another civilian. Arrested more than eight months after Pearl Harbor, he was tried before a military tribunal, convicted and sentenced to five years imprisonment. Both defendants brought habeas corpus proceedings, chal-

lenging the authority of the military courts on both Constitutional and statutory grounds. The Supreme Court, in an opinion by Mr. Justice Black, held that the Organic Act did not give the armed forces power to supplant all civilian laws and to substitute military for judicial trials under the conditions that existed at the time defendants were tried. Said the court: "We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of 'martial law' it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase 'martial law' as employed in that act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals." Mr. Chief Justice Stone and Mr. Justice Murphy wrote separate concurring opinions and Justices Burton and Frankfurter dissented. The court thus based its decision on the meaning and purpose of the Organic Act rather than the power of Congress under the Constitution to authorize the measures which had been taken by the military commander. See Anthony, *Martial Law in Hawaii*, 30 Cal. L. Rev. 371 (1942); Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 Cal. L. Rev. 477 (1943); Frank, *Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 Col. L. Rev. 639 (1944); Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 Harv. L. Rev. 833 (1946).

3. *Matter of Yamashita*, 327 U. S. 1, 90 L. ed. 499, 66 Sup. Ct. 340 (1946) involved the case of a Japanese general who had been tried, convicted and sentenced to death by a military commission in Manila for war crimes in the Philippines. It was contended that the trial had violated various provisions of the Articles of War as well as of the Geneva Convention of 1929 relating to prisoners of war. Denying relief (Justices Murphy and Rutledge dissenting), the court held that the commission was lawfully convened and constituted, that petitioner was charged with violations of the law of war, that the commission had authority to proceed with the trial, and in so doing did not violate any military, statutory, or Constitutional command. Chief Justice Stone's opinion said: "The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government." For a complete history of the case see Reel, *The Case of General Yamashita* (1949).

### KOREMATSU v. UNITED STATES.

Supreme Court of the United States, 1944.  
323 U. S. 214, 89 L. ed. 194, 65 Sup. Ct. 193.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, Cali-

foria, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U. S. C. § 97a [F. C. A. 18 § 97a], which provides that "\* \* \* whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. \* \* \*"

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the Hirabayashi case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the Hirabayashi case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the Hirabayashi case, *supra*, (320 U. S. at page 99), “\* \* \* we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an

immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. \* \* \* In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato*, 317 U. S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed. Reg. 2601. That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he violated, knowing of its existence. There is therefore

no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3rd orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers," in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration." Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center, we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. \* \* \* There is no reason why violations of these orders, insofar as they were promulgated pursuant to

congressional enactment, should not be treated as separate offenses.

\* \* \*

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the

calm perspective of hindsight—now say that at that time these actions were unjustified. Affirmed.

[MR. JUSTICE FRANKFURTER wrote a concurring opinion which is omitted here.]

MR. JUSTICE ROBERTS, dissenting.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Hirabayashi v. United States*, 320 U. S. 81, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress. \* \* \*

The predicament in which the petitioner found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,—and, in the light of the above recitation, I think it is not,—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

\* \* \*

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were

nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo Case, *supra*. The answer, of course, is that where he was subject to two conflicting laws he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter. \* \* \*

I would reverse the judgment of conviction.

MR. JUSTICE MURPHY, dissenting. \* \* \*

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence." Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be. \* \* \*

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

MR. JUSTICE JACKSON, dissenting. \* \* \*

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all one's antecedents had

been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it. \* \* \*

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case. \* \* \*

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be

their responsibility to the political judgments of their contemporaries and to the moral judgments of history. \* \* \*

#### NOTES

1. *Ex parte Endo*, 323 U. S. 283, 89 L. ed. 243, 65 Sup. Ct. 208 (1944), decided the same day as the reported case, held that an American citizen of Japanese ancestry, conceded by the Department of Justice and by the War Relocation Authority to be loyal and law-abiding, could not be detained in a relocation center. Mr. Justice Douglas, for the court, said: "Loyalty is a matter of the heart and mind, not of race, creed or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."

2. The Alien Enemy Act of 1798 confers upon the President broad powers of apprehension, restraint and removal of enemy aliens whenever there is a "declared war" between this country and any foreign nation. Petitioner, a German enemy alien, was arrested December 8, 1941, and interned after a hearing before the Alien Enemy Hearing Board in February, 1942. By executive order in July, 1945, the President directed the removal of all enemy aliens "deemed dangerous to the public peace and safety" by the Attorney-General. In January, 1946, the Attorney-General ordered petitioner's removal. In *Ludecke v. Watkins*, 335 U. S. 160, 92 L. ed. 1881, 68 Sup. Ct. 1429 (1948) the Supreme Court sustained denial of petitioner's writ of habeas corpus. The removal order was held not subject to judicial review. Petitioner's claim that Presidential summary power under the Act did not survive the cessation of actual hostilities was also dismissed on the ground that, under existing post-war conditions, the war could not be considered as terminated, and that in any event the question was one to be decided by the political arm of the government, not the courts. Justices Black, Douglas, Murphy and Rutledge dissented on the ground that, as regards the deportability of alien enemies, the war should be considered as terminated. Justices Douglas, Murphy and Rutledge dissented on the ground that, for purposes of review on habeas corpus, the deportation of an enemy alien is no different from that of any other deportation proceeding and is subject to the same due process requirements of reasonable notice and fair hearing.

3. In *Kawakita v. United States*, 343 U. S. 717, 96 L. ed. 1249, 72 Sup. Ct. 950 (1952) the Supreme Court upheld the treason conviction of defendant, a national both of the United States and of Japan, the overt acts relating to his treatment of American prisoners of war. The important issue in the case was whether defendant had renounced his United States citizenship and became expatriated by reason of acts committed in Japan during the war. He was born in this country of Japanese parents who were citizens of Japan. In 1939 he went to Japan with his father, traveling on a United States passport. In 1940 he registered with an American consul in Japan as an American citizen. Remaining in Japan, he entered Meiji University in March, 1941, taking a commercial course and military training. In April, 1941, he renewed his United States passport, once more taking the oath of allegiance. During this period he was registered as an alien with the Japanese police. Defendant became of age in 1942 and completed his schooling in 1943, at which time it was impossible for him to return to the United States. In 1943 he registered in the Koseki, a family census register. He did not join the Japanese Army but obtained employment as an interpreter. He interpreted communications between the Japanese and prisoners of war who were assigned to work at the mine and in the munitions factory of his employer. The treasonable acts for which he was convicted involved his cruel conduct toward American prisoners of war. In December, 1945, he went to the United States consul at Yokohama and applied for registration as an

American citizen. He stated under oath that he was a United States citizen and had not done various acts amounting to expatriation. He was issued a passport and returned to the United States, where he was recognized by a former prisoner of war and arrested, charged with treason.

On this set of facts, Mr. Justice Douglas, speaking for a majority of the court, said that the evidence was sufficient to sustain (1) a finding that the accused had not renounced his American citizenship, and (2) a finding of adhering to the enemy during the war. "The issue of intent to betray, like the citizenship issue, was plainly one for the jury to decide. We would have to reject all the evidence adverse to petitioner and accept as the truth his protestations when the shadow of the hangman's noose was on him in order to save him from the finding that he did have the intent to betray." Chief Justice Vinson, joined by Justices Black and Burton, dissented on the ground that defendant had expatriated himself, as a matter of law, as well as that can be done.

Other recent prosecutions for treason include *Cramer v. United States*, 325 U. S. 1, 89 L. ed. 1441, 65 Sup. Ct. 918 (1945); *Haupt v. United States*, 330 U. S. 631, 91 L. ed. 1145, 67 Sup. Ct. 874 (1947); *Best v. United States*, 184 F. (2d) 131 (C. A. 1, 1950), cert. den. 340 U. S. 939 (1951); *D'Aquino v. United States*, 192 F. (2d) 338 (C. A. 9, 1951), cert. den. 343 U. S. 935 (1952). See, also, Hurst, *Treason in the United States*, 58 Harv. L. Rev. 226, 395, 806 (1945).

4. In *Hartzel v. United States*, 322 U. S. 680, 88 L. ed. 1534, 64 Sup. Ct. 1233 (1944) the Supreme Court reversed the conviction of defendant for violation of the Espionage Act of 1917 on the ground of insufficiency of evidence. Defendant had published three scurrilous articles opposing World War II as a betrayal of the country, denouncing the allies of the United States, appealing to various forms of racial prejudice and assailing the integrity and patriotism of the President. In a five-to-four decision the court concluded that there was nothing on the face of the pamphlets to indicate that defendant had intended specifically to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces or to obstruct recruiting and enlistment therein. The dissemination of such doctrines "cannot by themselves be taken as proof beyond a reasonable doubt that the petitioner had the narrow intent requisite to a violation of this statute."

### WOODS v. MILLER CO.

Supreme Court of the United States, 1948.  
333 U. S. 138, 92 L. ed. 596, 68 Sup. Ct. 421.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The case is here on a direct appeal, Act of Aug. 24, 1937, 50 Stat. 751, 752, c. 754, 28 U. S. C. § 349(a), 8 F. C. A. title 28, § 349(a), from a judgment of the District Court holding unconstitutional Title II of the Housing and Rent Act of [June 30] 1947. Pub. Law 129, 80th Cong. 1st Sess. 5 U. S. C. § 1001, F. C. A. 50 Appx. §§ 1891-1902.

The Act became effective on July 1, 1947, and the following day the appellee demanded of its tenants increases of 40% and 60% for rental accommodations in the Cleveland Defense-Rental Area, an admitted violation of the Act and regulations adopted pursuant thereto. Appellant thereupon instituted this proceeding under § 206(b) of the Act to enjoin the violations. A preliminary injunction issued. After a hearing it was dissolved and a permanent injunction denied.

The District Court was of the view that the authority of Congress to regulate rents by virtue of the war power (see *Bowles v. Willingham*, 321 U. S. 503) ended with the Presidential Proclamation terminating hostilities on December 31, 1946, since that proclamation inaugurated "peace-in-fact" though it did not mark termination of the war. It also concluded that, even if the war power continues, Congress did not act under it because it did not say so, and only if Congress says so, or enacts provisions so implying, can it be held that Congress intended to exercise such power. That Congress did not so intend, said the District Court, follows from the provision that the Housing Expediter can end controls in any area without regard to the official termination of the war, and from the fact that the preceding federal rent control laws (which were concededly exercises of the war power) were neither amended nor extended. The District Court expressed the further view that rent control is not within the war power because "the emergency created by housing shortage came into existence long before the war." It held that the Act "lacks in uniformity of application and distinctly constitutes a delegation of legislative power not within the grant of Congress" because of the authorization to the Housing Expediter to lift controls in any area before the Act's expiration. It also held that the Act in effect provides "low rentals for certain groups without taking the property or compensating the owner in any way." See 74 F. Supp. 546.

We conclude, in the first place, that the war power sustains this legislation. The Court said in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 161, that the war power includes the power "to remedy the evils which have arisen from its rise and progress" and continues for the duration of that emergency. Whatever may be the consequences when war is officially terminated, the war power does not necessarily end with the cessation of hostilities. We recently held that it is adequate to support the preservation of rights created by wartime legislation. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111. But it has a broader sweep. In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, supra, and *Jacob Ruppert, Inc. v. Caffey*, 251 U. S. 264, prohibition laws which were enacted after the Armistice in World War I were sustained as exercises of the war power because they conserved manpower and increased efficiency of production in the critical days during the period of demobilization, and helped to husband the supply of grains and cereals depleted by the war effort. Those cases followed the reasoning of *Stewart v. Kahn* (*Stewart v. Bloom*), 11 Wall. 493, which held that Congress had the power to toll the statute of limitations of the States during the period when the process of their courts was not available to litigants due to the conditions obtaining in the Civil War.

The constitutional validity of the present legislation follows a fortiori from those cases. The legislative history of the present Act makes

abundantly clear that there has not yet been eliminated the deficit in housing which in considerable measure was caused by the heavy demobilization of veterans and by the cessation or reduction in residential construction during the period of hostilities due to the allocation of building materials to military projects. Since the war effort contributed heavily to that deficit, Congress has the power even after the cessation of hostilities to act to control the forces that a short supply of the needed article created. If that were not true, the Necessary and Proper Clause, Art. 1, § 8, cl. 18, would be drastically limited in its application to the several war powers. The Court has declined to follow that course in the past. *Hamilton v. Kentucky Distilleries & Warehouse Co.* supra; *Jacob Rupert, Inc., v. Caffey*, supra. We decline to take it today. The result would be paralyzing. It would render Congress powerless to remedy conditions the creation of which necessarily followed from the mobilization of men and materials for successful prosecution of the war. So to read the Constitution would be to make it self-defeating.

We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities. And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, and *Jacob Rupert, Inc. v. Caffey*, 251 U. S. 264, both supra.

The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise. Here it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause. Its judgment on that score is entitled to the respect granted like legislation enacted pursuant to the police power. \* \* \*

Under the present Act the Housing Expediter is authorized to remove the rent controls in any defense-rental area if in his judgment the need no longer exists by reason of new construction or satisfaction of demand in other ways. The powers thus delegated are far less extensive than those sustained in *Bowles v. Willingham*, supra. Nor is there here a grant of unbridled administrative discretion. The standards prescribed pass muster under our decisions. See *Bowles v. Willingham*, supra, and cases cited. \* \* \*

The fact that the property regulated suffers a decrease in value is no more fatal to the exercise of the war power (*Bowles v. Willingham*, supra) than it is where the police power is invoked to the same end. See *Block v. Hirsh*, 256 U. S. 135. Reversed.

MR. JUSTICE FRANKFURTER concurs in this opinion because it decides no more than was decided in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, and *Jacob Ruppert, Inc. v. Caffey*, 251 U. S. 264, and merely applies those decisions to the situation now before the Court.

[MR. JUSTICE JACKSON wrote a concurring opinion which is omitted.]

#### NOTES

1. The Emergency Price Control Act of 1942 gave the Administrator of the Office of Price Administration broad authority to fix maximum prices on most commodities and on residential rents. The Act created a special Emergency Court of Appeals to pass upon the validity of OPA regulations. In *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834, 64 Sup. Ct. 660 (1944) the price-fixing provisions of the statute were held valid, while in *Bowles v. Willingham*, 321 U. S. 503, 88 L. ed. 892, 64 Sup. Ct. 641 (1944) the rent-control sections of the act were upheld.

2. The validity of the Renegotiation Act of 1942 was sustained as an exercise of the war power in *Lichter v. United States*, 334 U. S. 742, 92 L. ed. 1694, 68 Sup. Ct. 1294 (1948). This legislation, which provided for the recapture by the United States of "excessive profits" on war contracts, was based on the theory that government procurement during the war proceeded with such speed and such quantity that it was impossible to determine in advance what fair prices would be. Thus some contracts were to be subject to "renegotiation" in the light of subsequent experience to determine fair prices. The statute was upheld as against contentions that it constituted an unconstitutional delegation of legislative power, involved an unlawful taking of private property for public use, and could not properly be applied to contracts entered into before its enactment.

3. The treaty-making power of the national government and the conduct of foreign relations have been dealt with previously in Chapter II of this casebook. The powers to acquire and govern territory and to legislate for the District of Columbia were discussed in Chapter III. The power over aliens and the control of the naturalization process have been considered in Chapter IV. The power over elections and the enforcement of the suffrage guaranty of the Constitution are covered in Chapter IX. The commerce power of Congress is taken up in detail in the next chapter.

Limitations of space have prevented the inclusion of cases dealing with other important powers of the national government such as the bankruptcy power (Const., Art. I, § 8, cl. 4), the postal power (Art. I, § 8, cl. 7), those relating to admiralty and maritime matters (Art. III, § 2, cl. 1), and those dealing with patents and copyrights (Art. I, § 8, cl. 8).

CHAPTER VI  
THE REGULATION OF COMMERCE

Section 1.—What is Commerce—Interstate and Foreign?

GIBBONS v. OGDEN.

Supreme Court of the United States, 1824.  
9 Wheat. 1, 6 L. ed. 23.

[Ogden filed a bill in the Court of Chancery of New York, setting forth that Livingston and Fulton had been granted by the legislature of New York a monopoly of navigating by fire or steam all the waters within the jurisdiction of that state; that he, Ogden, had acquired by assignment from them the privilege of operating vessels by fire or steam between Elizabethtown, New Jersey, and New York City; that defendant, Gibbons, was operating two steamboats between Elizabethtown and New York City, in violation of the monopoly, and prayed that defendant be enjoined. The defendant answered that his vessels were enrolled and licensed for the coasting trade under an act of Congress of February 18, 1793. The Chancellor granted a permanent injunction; his decree was affirmed by the Court for the Trial of Impeachments and Errors of New York, and this writ of error was taken.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States. \* \* \* The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be con-

fined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." \* \* \*

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary-line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through

the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. \* \* \* The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may sever-

erally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. Both parties have appealed to the Constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy,

then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it? \* \* \*

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to Congress, and consequently they remain subject to state legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the states,—may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means.

All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise the powers of the other. \* \* \*

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted. \* \* \*

It has been said that the Constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. \* \* \*

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. \* \* \* The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do what-

ever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. \* \* \*

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate. If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. \* \* \*

Steam boats may be enrolled and licensed, in common with vessels using sails, \* \* \* and the act of a state inhibiting the use of either to any vessel having the license under the act of Congress comes, we think, in direct collision with that act. Decree reversed.

[MR. JUSTICE JOHNSON concurred on the ground that the commerce clause vested in Congress the sole power to regulate foreign and interstate commerce and of its own force, without any action taken by Congress, wholly excluded the states from regulating such commerce. In his view the act of Congress licensing vessels for the coastwise trade had no bearing.]

#### NOTES

1. It is axiomatic that one of the principal sources of weakness of the Articles of Confederation as the basis for a federal system was the lack of power in the central government to regulate commerce among the several states and with foreign countries. Under the Articles, the imposition by some of the states of discriminatory restrictions and burdens on goods in transit through their territories frequently caused serious disputes. The primary means through which the founding fathers sought to deal with these admitted evils was to insert a clause in the Constitution (Art. I, § 8, cl. 3) vesting in Congress the power "to regulate commerce with foreign nations, and among the several states." This broad affirmative grant of the commerce power to the central government has been the source, from time to time, of acute conflicts among powerful competing commercial interests within the country and between the states and the nation.

The power delegated to Congress by the commerce clause has been construed to be plenary but not unlimited, supreme but not exclusive. While state laws in conflict with a valid regulation of commerce by Congress are void, the states in many situations may deal with matters of local concern in such a way as to exercise power over interstate commerce. The grant of the commerce power to Congress has thus given rise to two principal classes of problems: (1) What is the scope of the national legislative power under the commerce clause? How is it affected by other limitations imposed by the Constitution on the federal government? (2) What is the extent of the states' power to legislate under the com-

merce clause? When does the national power end and the power of the states begin? What matters, if any, may be the concurrent concern of both? The tremendous importance of the Supreme Court as the arbiter of the relations between the individual and government and between the states and the nation is strikingly exemplified by its decisions under the commerce clause.

2. In the period before the Civil War one of the basic and recurrent problems before the court was the extent to which business and commercial enterprise should be protected from legislative restriction by the individual states. For example, did the commerce clause of its own force impliedly prohibit state regulation of interstate commerce, or were the states free to regulate unless prevented by affirmative congressional action? It was the negative implications of the federal commerce power—the limitations it assertedly imposed upon the states by virtue of its mere existence—which mainly occupied the attention of the court during this formative period of constitutional development. This is not surprising in view of the fact that it was not until 1887, with the enactment of the Interstate Commerce Act, that Congress made any substantial attempt to exercise its powers under the commerce clause to regulate the national economy.

The history of the adoption of the commerce clause by the Constitutional Convention afforded no conclusive support for the proposition that the framers intended it to confer an exclusive power of regulation on Congress. Chief Justice Marshall, although leaving the issue undecided in *Gibbons v. Ogden*, inclined to this view and thought that it was the function of the Supreme Court to prevent state interference with interstate commerce even in situations where Congress had not acted and hence no conflict between state and federal power was involved. But even Marshall shrank from the full implications of his philosophy in this regard. Five years after *Gibbons v. Ogden*, in *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (1829), in the absence of any legislation by Congress on the matter, a state was permitted to dam a navigable river. The court, speaking through Marshall, reasoned that the Delaware statute authorizing the construction of the dam could not, "under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." Noting that the state's objectives were the improvement of the health of the inhabitants and the enhancement of property values, Marshall concluded: "Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." In thus recognizing the reserved power of the states, in the absence of legislation by Congress, to deal with some matters primarily of local concern, Marshall apparently did not view such action as involving state regulation of interstate commerce.

The point to be noted here is that the doctrine of the exclusive nature of the federal power over interstate commerce, to the extent that it held sway in the decisions of the court, did not operate to enhance the exercise of national power but to invalidate attempted regulation by the states and thus to leave the commercial interests involved subject to no governmental control at all.

3. *Gibbons v. Ogden* has been characterized as one of Chief Justice Marshall's greatest and most decisive opinions. For an excellent short discussion see Haines, *The Role of the Supreme Court in American Government and Politics, 1789-1835* (1944), 488 *et seq.* See also, for historical background, 2 Warren, *The Supreme Court in United States History* (1923), ch. 15; 4 Beveridge, *The Life of John Marshall* (1919), ch. 8. On the history of the commerce clause prior to *Gibbons v. Ogden*, see the studies of Abel, *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Facilities*, 25 N. Car. L. Rev. 121 (1947); *Commerce Regulation Before Gibbons v. Ogden: Interstate Transportation Enterprise*, 18 Miss. L. J. 335 (1947); *Commerce Regulation Before Gibbons v. Ogden: Trade and Traffic*, 14 Brooklyn L. Rev. 38, 215 (1947-48). See

also, Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432 (1941). For a comprehensive presentation of the unorthodox thesis that the commerce clause, if its meaning were correctly interpreted, empowers Congress to govern "all gainful activity" throughout the country, and that the phrase "among the several states" was never intended to have the meaning "interstate," as invented and developed by the Supreme Court, see Crosskey, *Politics and the Constitution in the History of the United States* (2 vols. 1953).

4. For Chancellor Kent's opinion holding that the state regulation was enforceable until it came into actual conflict with the federal law, see *Ogden v. Gibbons*, 4 Johns. Ch. 150 (1818), affirmed by the Court of Errors, 17 Johns. 488 (1820). In *Livingston v. Van Ingen*, 9 Johns. 507 (1812) Chancellor Kent had previously upheld the same monopoly.

5. The cases reprinted in this section and those summarized in the notes are illustrative of attempts by the Supreme Court to mark out a line between transactions which are included within the term "commerce" and those which are not, and transactions in commerce which are deemed to be "interstate" in character and those which are not. Needless to say, the court has not been altogether successful in drawing such lines and the cases are not entirely reconcilable. Sometimes, too, the court has employed the words "commerce" and "interstate commerce" interchangeably, using the former term as shorthand for the latter. Taken together, nevertheless, the cases comprise a serviceable introduction to the study of the paramount problems posed in the following sections relating to the scope of federal legislative power under the commerce clause and the limit of the states' power to enact laws which affect the conduct of interstate commerce. In reading the cases the student should bear in mind that the extent of congressional power to enact legislation under the commerce clause regulative of the national economy is no longer delimited by determining whether the transactions or activities involved are themselves commerce, or, if commerce, whether they are interstate or intrastate in nature. The test (as will more fully appear in the succeeding section) is whether the activities, even if confined to a single state, have such a close and substantial relation to interstate commerce that their regulation is essential to protect such commerce from burdens and obstructions. While the interstate element must be present to support legislative action by Congress, the sweep of its power to regulate is not curtailed by the fact that the activities sought to be controlled, when separately viewed, are purely local or intrastate.

For a short discussion of many of the cases reprinted in this section or summarized in the notes, see Carpenter and Mardian, *What is Commerce?* 22 So. Cal. L. Rev. 398 (1949), and *When is Commerce Interstate?* 22 So. Cal. L. Rev. 406 (1949).

### UNITED STATES v. SIMPSON.

Supreme Court of the United States, 1920.

252 U. S. 465, 64 L. ed. 665, 40 Sup. Ct. 364, 10 A. L. R. 510.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is an indictment under § 5 of the Act of March 3, 1917, known as the Reed Amendment, 39 Stat. 1069, c. 162, which declares that—

"Whoever shall \* \* \* cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state \* \* \* the laws of which \* \* \* prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished," etc.

And the question for decision is whether the statute was applicable where the liquor—five quarts of whisky—was transported by its owner in his own automobile and was for his personal use and not for an excepted purpose. The District Court answered the question in the negative and on that ground sustained a demurrer to the third count, which is all that is here in question and discharged the accused. 257 Fed. 860.

We think the question should have been answered the other way. The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition state from another state for purposes other than those specially excepted—a matter which Congress could and the states could not control. *Danciger v. Cooley*, 248 U. S. 319, 323. The introduction could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce. *Kelley v. Rhoads*, 188 U. S. 1; *United States v. Chavez*, 228 U. S. 525, 532-533; *United States v. Mesa*, 228 U. S. 533; *Pipe Line Cases*, 234 U. S. 548, 560; *United States v. Hill*, 248 U. S. 420. The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit. See *Kirmeyer v. Kansas*, 236 U. S. 568. At all events we perceive no reason for rejecting the natural import of its words and holding that it was confined to transportation for hire or by public carriers.

The published decisions show that a number of the federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases where the transportation was personal and private, as here. *Ex parte Westbrook*, 250 Fed. 636; *Malcolm v. United States*, 256 Fed. 363; *Jones v. United States*, 259 Fed. 104; *Berryman v. United States*, 259 Fed. 208.

That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in *United States v. Hill*, *supra*.

We conclude that the District Court erred in construing the statute and sustaining the demurrer. Judgment reversed.

[Mr. JUSTICE CLARKE dissented.]

#### NOTES

1. In *United States v. Hill*, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. 143 (1919) it was held that the same statute applied to the case of a defendant who

rode in a street car from Kentucky to West Virginia with a quart of intoxicating liquor on his person, which he had bought in Kentucky for his personal use. It had previously been decided that transportation of beer across a state boundary for sale is interstate commerce, though the beer is carried by the owner in his own wagon. *Kirmeyer v. Kansas*, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. 419 (1915).

2. The act of driving a stolen car constitutes commerce. In *Brooks v. United States*, 267 U. S. 432, 69 L. ed. 699, 45 Sup. Ct. 345, 37 A. L. R. 1407 (1925) the National Motor Vehicle Theft Act, making the transportation of stolen motor vehicles in interstate or foreign commerce a federal offense, was held constitutional.

3. Where the carriage is by independent carrier, for hire, the carriage is interstate commerce even though the purpose at the destination is not commercial. *Caminetti v. United States*, 242 U. S. 470, 61 L. ed. 442, 37 Sup. Ct. 192, L. R. A. 1917F, 502 (1917) (holding that the Mann White Slave Traffic Act applies to the transportation in interstate commerce of a woman for purposes of private immorality, with no commercial vice in the case.)

4. In *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 14 Sup. Ct. 1087 (1894), holding that a single state has no power to regulate tolls upon a bridge connecting it with another state without the assent of Congress and the concurrence of such other state, the court said that "the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

5. The transmission of intelligence from state to state is interstate commerce regardless of the means through which it is effected. In *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 30 Sup. Ct. 481, 27 L. R. A. (N. S.) 493 (1910) it was held that the business of the International Correspondence Schools in transporting books, apparatus and papers to students in another state and in receiving papers and contracts from them in return constituted interstate commerce. The physical activities of radio broadcasting and the projection of motion pictures across state lines have been held to be interstate commerce. *Fisher's Blend Station v. State Tax Commission*, 297 U. S. 650, 80 L. ed. 956, 56 Sup. Ct. 608 (1936); *Pantomimic Corporation v. Malone*, 238 Fed. 135 (C. C. A. 2d 1916). By its nature broadcasting transcends state lines and is within the protection, and subject to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 77 L. ed. 1166, 53 Sup. Ct. 627, 89 A. L. R. 406 (1933), sustaining, as against due process objections, the Commission's broad powers over the allocation of wave lengths.

6. Commerce also includes the transportation of oil or natural gas by pipelines. *Pipe Line Cases*, 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. 956 (1914); *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. 658, 32 A. L. R. 300 (1923). "The sale of natural gas originating in one state and its transportation and delivery to distributors in any other state constitutes interstate commerce, which is subject to regulation by Congress." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. ed. 1037, 62 Sup. Ct. 736 (1942). The interstate transmission and sale of electric current is interstate commerce, and its character as such is not altered by the mere passing of custody and title at the state's boundary. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. ed. 549, 47 Sup. Ct. 294 (1927).

7. In *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. 259 (1903) the driving of sheep across state lines was held to constitute interstate commerce. The same result was reached as regards cattle which were only ranging across state lines. *Thornton v. United States*, 271 U. S. 414, 70 L. ed. 1013, 46 Sup. Ct. 585 (1926).

8. Dealing in fraudulent interstate bills of lading in the absence of any commodities has been held to constitute interstate commerce. *United States v. Ferger*, 250 U. S. 199, 63 L. ed. 936, 39 Sup. Ct. 445 (1919). But in *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 992 (1850) a state tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not in conflict with the commerce power of Congress, the court saying that such persons are "not engaged in commerce, but in supplying an instrument of commerce."

## UNITED STATES v. SOUTH-EASTERN UNDERWRITERS ASSN.

Supreme Court of the United States, 1944.

322 U. S. 533, 88 L. ed. 1440, 64 Sup. Ct. 1162.

MR. JUSTICE BLACK delivered the opinion of the Court.

For seventy-five years this Court has held, whenever the question has been presented, that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.

Appellees—the South-Eastern Underwriters Association (S. E. U. A.), and its membership of nearly 200 private stock fire insurance companies, and 27 individuals—were indicted in the District Court for alleged violations of the Sherman Anti-Trust Act. The indictment alleges two conspiracies. The first, in violation of § 1 of the Act, was to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified "allied lines" of insurance in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia; the second, in violation of § 2, was to monopolize trade and commerce in the same lines of insurance in and among the same states. \* \* \*

The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade or commerce" among the states. Appellees have not argued otherwise. Their defense, set forth in a demurrer, has been that they are not required to conform to the standards of business conduct established by the Sherman Act because "the business of fire insurance is not commerce."

Sustaining the demurrer, the District Court held that "the business of insurance is not commerce, either intrastate or interstate"; it "is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon." 51 F. Supp. 712, 713, 714. \* \* \*

The record, then, presents two questions and no others: (1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute "Commerce among the several States" so as to make them subject to regulation by Congress under the Commerce Clause? Since it is our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question.

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce" as used in the Commerce Clause does not include a business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons bought and sold, bargained and contracted. And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.

The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. Its total assets exceed \$37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed \$6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship,

interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.

That the fire insurance transactions alleged to have been restrained and monopolized by appellees fit the above described pattern of the national insurance trade is shown by the indictment before us. Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S. E. U. A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931-1941 a total of \$488,000,000 in premiums was collected by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period \$215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policyholders. Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special traveling agents supervised local operations. The insurance sold by members of S. E. U. A. covered not only all kinds of fixed local properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation.

Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869 this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 8 Wall. 168, 183. Since then, in similar cases, this statement has been repeated, and has been broadened. In *Hooper v. California*, 155 U. S. 648, 654, 655, decided in 1895, the Paul statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913 the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the Paul statement and held against the company, saying that "contracts of insurance are not commerce at all, neither state nor interstate." *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 503-504, 510.

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866 the insurance trade, though still in its infancy, was subject to widespread abuses. To meet the imperative need for correction of these abuses the various state legislatures, including that of Virginia, passed regulatory legislation. *Paul v. Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul v. Virginia*'s generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause. Furthermore, the reasons given in support of the generalization that "the business of insurance is not commerce" and can never be conducted so as to constitute "Commerce among the States" are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause.

One reason advanced for the rule in the Paul case has been that insurance policies "are not commodities to be shipped or forwarded

from one State to another." But both before and since *Paul v. Virginia* this Court has held that Congress can regulate traffic though it consist of intangibles. Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. *Wickard v. Filburn*, 317 U. S. 111, 119-120; *Parker v. Brown*, 317 U. S. 341, 360. We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf. *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 557-558. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift & Co. v. United States*, 196 U. S. 375, 398. In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.

Another reason advanced to support the result of the cases which follow *Paul v. Virginia* has been that, if any aspects of the business of insurance be treated as interstate commerce, "then all control over it is taken from the States and the legislative regulations which this Court has heretofore sustained must be declared invalid." Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid.

The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it.

Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. *Lottery Case*, 188 U. S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke v. United States*, 227 U. S. 308, 320-323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States v. Simpson*, 252 U. S. 465; to drive a stolen automobile from Iowa to South Dakota, *Brooks v. United States*, 267 U. S. 432, 436-439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thorn-ton v. United States*, 271 U. S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation;—activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189-190: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. \* \* \*" Commerce is interstate, he said, when it "concerns more States than one." *Id.*, 194. No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states.

The power confined to Congress by the Commerce Clause is declared in *The Federalist* to be for the purpose of securing the "maintenance of harmony and proper intercourse among the States." But its purpose is not confined to empowering Congress with the negative authority to legislate against state regulations of commerce deemed inimical to the national interest. The power granted Congress is a

positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.

Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade. \* \* \*

[The Court considered and rejected this contention in the portion of the opinion omitted here.]

Reversed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED took no part in the consideration or decision of this case.

[MR. CHIEF JUSTICE STONE and JUSTICES FRANKFURTER and JACKSON dissented on the question of statutory construction.]

#### NOTES

1. Following the decision in the principal case, in order to set at rest doubts as to the continued validity of state laws regulating insurance companies, Congress enacted the Ferguson-McCarran Act of 1945, declaring that "the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states" and providing that: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

In *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 90 L. ed. 1342, 66 Sup. Ct. 1142, 164 A. L. R. 476 (1946), the Supreme Court sustained a South Carolina tax on premiums received by foreign insurance companies from business done in that state, without reference to its interstate or local character, the tax being imposed as a condition of doing business in South Carolina and no similar tax being required of domestic corporations. Noting the fact that there have been Supreme Court decisions holding that the silence of Congress was to be construed as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it and that the court had never held such disclaimer invalid but had always given effect to the congressional judgment, the court said that "Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to

the business of insurance by the national public interest." The court viewed the Ferguson-McCarran Act as a "determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business." The decision thus upholds the power of Congress, under the commerce clause, to enact legislation which sanctions state laws which in effect discriminate against interstate commerce. See Note, Congressional Consent to Discriminatory State Legislation, 45 Col. L. Rev. 927 (1945).

2. In *Polish National Alliance v. National Labor Relations Board*, 322 U. S. 643, 88 L. ed. 1509, 64 Sup. Ct. 1196 (1944), decided on the same day as the principal case, the Supreme Court, with eight justices participating, held that insurance employees were subject to the National Labor Relations Act, which was enacted in order to protect interstate commerce from "unfair labor practices affecting commerce." For further discussion of the cases see Powell, *Insurance as Commerce in Constitution and Statute*, 57 Harv. L. Rev. 937 (1944).

3. In *Federal Baseball Club of Baltimore v. National League*, 259 U. S. 200, 66 L. ed. 898, 42 Sup. Ct. 465 (1922) it was held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal anti-trust laws. In *Toolson v. New York Yankees*, 346 U. S. 356, 98 L. ed. 64, 74 Sup. Ct. 78 (1953) the Supreme Court refused to overrule this decision. Pointing out that Congress has had the previous ruling under consideration for more than thirty years but has not seen fit to bring such business under these laws by legislation having prospective effect, the court said, in a per curiam opinion: "We think that if there are evils in this field which now warrant application to it of the anti-trust laws it should be by legislation." Justices Burton and Reed, dissenting, thought that in the light of existing conditions it was a contradiction in terms to say that those participating in organized professional baseball were not engaged in interstate trade or commerce, as those terms are used in the Constitution and in the Sherman Act.

### WESTERN UNION TELEGRAPH CO. v. SPEIGHT.

Supreme Court of the United States, 1920.

254 U. S. 17, 65 L. ed. 104, 41 Sup. Ct. 11.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought in a state court by the respondent against the petitioner, the Telegraph Company, to recover for mental suffering caused by a mistake in delivering a telegraphic message. The message handed to the defendant was "Father died this morning. Funeral tomorrow, 10:10 a. m.," and was dated January 24. As delivered to the plaintiff on January 24 it was dated January 23 and thus caused her to fail to attend the funeral which otherwise she would have done. The message was from Greenville, North Carolina to Rosemary in the same state, and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the company for years, and the company defends on the ground that the message was sent in interstate commerce, and that therefore a suit could not be maintained for mental suffering alone. Southern Express Co.

v. Byers, 240 U. S. 612. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the law of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside "as a matter of law" and ordered a non-suit. But on appeal the supreme court of the state set aside the non-suit and directed that a judgment be entered on the verdict.

We are of opinion that the judge presiding at the trial was right and that the supreme court was wrong. Even if there had been any duty on the part of the telegraph company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two states is interstate commerce as a matter of fact. *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617. The fact must be tested by the actual transaction. *Kirmeyer v. Kansas*, 236 U. S. 568, 572.

As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Richmond was the relay point from Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business also was. It would have been possible, physically, to send direct from Weldon but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when as here the termini were in the same state the business was intrastate unless it was necessary to cross the territory of another state in order to reach the final point. This, as we have said, is not the law. It did however lay down that the burden was on the company to show that what was done "was not done to evade the jurisdiction of the state." If the motive were material, as to which we express no opinion, this again is a mistake. The burden was in the plaintiff to make out her case. Moreover the motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss. Judgment reversed.

MR. JUSTICE PITNEY concurs in the result.

#### NOTES

1. In *Missouri Pacific R. Co. v. Stroud*, 267 U. S. 404, 69 L. ed. 683, 45 Sup. Ct. 243 (1925) it was held that a state statute regulating the furnishing of cars to shippers could not apply to a shipment from Oxy to St. Louis, both in Missouri, over a route that was partly in Illinois.

2. In *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. 214 (1903) it was held that a shipment of goods between two cities in Arkansas, but passing through Indian Territory, is interstate commerce and the state could not enforce local rates.

3. In *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999 (1871) it was held that the *Daniel Ball*, though navigating the waters of the Grand River in Michigan and operating wholly within the state, was engaged in interstate commerce insofar as it received goods from other states and transported goods going to other states.

4. In *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224 (1881) it was held that a steamship employed in navigation between San Francisco and San Diego was engaged in foreign commerce, such navigation being a matter affecting the nation in its external affairs and subject to national regulation.

5. Logs taken from the place of cutting and left on the river banks in readiness for floating downstream to another state were held not yet in interstate commerce and therefore subject to state taxation. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. 475 (1886). But where logs placed in a river to be floated downstream to another state are detained temporarily in the state of origin to await subsidence of the high water, they are in interstate commerce and not subject to local taxation. Here, since the interception was to promote safe and convenient transit, the continuity of the interstate journey was not broken. *Champlain Realty Co. v. Brattleboro*, 260 U. S. 366, 67 L. ed. 309, 43 Sup. Ct. 146, 25 A. L. R. 1195 (1922).

#### DAHNIKE-WALKER MILLING CO. v. BONDURANT.

Supreme Court of the United States, 1921.  
257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. 106.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was an action to recover damages for the breach of a contract for the sale and delivery of a crop of wheat estimated at 14,000 bushels. The plaintiff was a Tennessee corporation engaged in operating a flour and feed mill at Union City, in that state. The defendant was a resident of Hickman, Kentucky, and extensively engaged in farming in that vicinity. They were the parties to the contract. It was made at Hickman and the wheat was to be delivered and paid for there. But the delivery was to be on board the cars of a common carrier, and the plaintiff intended to ship the wheat to its mill in Tennessee. A small part of the crop was delivered as agreed, but delivery of the rest was refused, although the plaintiff was prepared and expecting to receive and pay for it. A payment advanced on the crop more than covered what was delivered. At the time for delivery wheat had come to be worth several cents per bushel more than the price fixed by the contract. The action was brought in a state court in Kentucky.

The principal defense interposed—the only one which we have occasion to notice—was to the effect that the plaintiff had not complied, as was the fact, with a statute of Kentucky (Ky. Stats. 1915, § 571) prescribing the conditions on which corporations of other states might do business in that state, and that the contract was therefore not

enforceable. To this the plaintiff replied that the only business done by it in Kentucky consisted in purchasing wheat and other grain in that state for immediate shipment to its Tennessee mill and then shipping the same there; that the contract in question was made in the course of this business and with the purpose of forwarding the wheat to the mill as soon as it was delivered on board the cars; that this transaction was in interstate commerce and as to it the statute of Kentucky whose application was invoked by the defendant was invalid because in conflict with the commerce clause of the Constitution of the United States.

The cause was tried twice. On the first trial the plaintiff obtained a verdict and judgment, the court ruling that the statute could not constitutionally be applied to the transaction in question. But the Court of Appeals of the state, while conceding the invalidity of the statute as respects transactions in interstate commerce, held the transaction in question was not in such commerce, declared the statute valid and properly enforceable as to that transaction and reversed the judgment with a direction for a new trial. That court proceeded on the theory that, as the contract was made in Kentucky, related to property then in that state and was to be wholly performed therein, the transaction was strictly intrastate and not within the reach or protection of the commerce clause of the Constitution of the United States. \* \* \*

Where goods in one state are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519. On the same principle, where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. \* \* \*

There is no controversy about the facts bearing on the character of the transaction in question. It had been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. **This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made.** In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. See *Swift & Co. v.*

United States, 196 U. S. 375, 398; *United States v. Reading Co.*, 226 U. S. 324, 367; *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456-468; *Eureka Pipe Line Co. v. Hallanan*, 251 U. S. 265. The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the state of its origin might be halted by the shipper in the exercise of the right of stoppage in transitu before it got out of that state. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. \* \* \*

For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the State of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause.

Judgment reversed.

MR. JUSTICE BRANDEIS, with whom concurred MR. JUSTICE CLARKE, dissenting [on a question of jurisdiction which is omitted above].

## NOTES

1. In *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 66 L. ed. 227, 42 Sup. Ct. 101 (1921), holding that oil held in the tanks of a pipe line company subject to order of the producer might not be taxed by a state though the producer could order it delivered either within or without the state, the court said: "It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

2. Labor agents who hire laborers for employment outside the state are not engaged in interstate commerce, though interstate transportation must follow. *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. 128 (1900). But drummers who solicit orders in one state for sellers located in another (as distinguished from peddlers who carry their wares with them) are engaged in interstate commerce because of the close relationship between the sale and the interstate transportation which follows. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. 592 (1887), reversing a state court conviction of defendant for drumming without a license on evidence that he solicited buyers for a firm whose place of business was outside the state, the court saying that "if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

3. Even though interstate movement of a commodity is ended, activities which are reasonably appropriate to the purposes of the interstate commerce

contract may still be held to be a part of the interstate transaction. Thus, in *York Manufacturing Co. v. Colley*, 247 U. S. 21, 62 L. ed. 963, 38 Sup. Ct. 430, 11 A. L. R. 611 (1918), where some three weeks were consumed in erecting the machinery for an ice manufacturing plant and another week in testing it, all in accordance with the terms of the contract, the purchaser being in no position to accept delivery until he saw the plant in operation, it was held that the selling company, a Pennsylvania corporation, was doing an interstate commerce business in Texas when its engineer and workmen set up and tested the plant in that state. But in *Browning v. Waycross*, 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. 578 (1914) the business of installing lightning rods for purchasers from an out-of-state seller, was held to be local in character and hence subject to a city occupation tax, despite the fact that the contract under which the rods were shipped bound the seller at his own expense to attach the rods to the houses of persons who ordered them.

## Section 2.—The Commerce Power of Congress.

### IN RE DEBS.

Supreme Court of the United States, 1895.  
158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. 900.

[During the great railroad strike in Chicago in 1894 the United States, by the United States district attorney for the Northern District of Illinois, filed a bill in the federal court for that district complaining that Debs and others, officers and members of the American Railway Union, on account of a dispute between the Pullman Company and its employees, conspired to prevent the hauling of Pullman cars by railroads, induced railroad employees to go out on strike, and by acts of violence prevented railroads from employing substitute workers, and by various acts of violence obstructed, derailed, wrecked and stopped trains, both passenger and freight, engaged in interstate commerce and in transporting United States mails. On the same day, July 2, 1894, the court issued a decree enjoining further obstruction or interference with such trains. On July 17 Debs and three other officers of the union were arrested, brought before the court, found guilty of contempt of the injunction and sentenced to imprisonment. They now petitioned the Supreme Court for a writ of habeas corpus alleging unlawfulness of their detention.]

MR. JUSTICE BREWER delivered the opinion of the Court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails

such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?  
\* \* \*

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress, by virtue of such grant, has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. \* \* \*

\* \* \* The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws.

But, passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced, and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated, either at the instance of the authorities, or by any individual suffering private damage therefrom. The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result. \* \* \*

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. \* \* \* We do not care to place our decision upon this ground alone. Every government, intrusted by the very terms of its being with powers and

duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is not sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. \* \* \* While it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. \* \* \* Indeed, the obstruction of a highway is a public nuisance (4 Bl. Comm. 167), and a public nuisance has always been held subject to abatement at the instance of the government. \* \* \*

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways,—the natural highways of the country,—and not over artificial highways, such as railroads; but \* \* \* the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. \* \* \*

Petition denied.

#### NOTE

1. Note that there was no legislation of Congress covering the situation involved in the principal case. Does the case exemplify the power of the federal judiciary to enjoin conduct which adversely affects interstate commerce, even in the absence of legislation, or is it explainable on other grounds?

## NORTHERN SECURITIES CO. v. UNITED STATES.

Supreme Court of the United States, 1904.  
193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

Appeal from the Circuit Court of the United States for Minnesota to review a decree enforcing, as against the defendants, the provisions of the Anti-Trust Act against combinations in restraint of interstate or foreign commerce.

MR. JUSTICE HARLAN announced the affirmance of the decree of the Circuit Court and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2d, 1890, commonly known as the Anti-Trust Act, and entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked by it in the bill. \* \* \*

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the national government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed, the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the states or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound

combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should hold the shares of the stock of the constituent companies; such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in *one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and, as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company, to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise \* \* \* in restraint of commerce among the several states or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies.

This combination is, within the meaning of the act, a "trust"; but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. \* \* \*

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs? \* \* \* Does the act of Congress prescribe, as a *rule for interstate or international commerce*, that the operation of the natural laws of competition between those engaged in *such commerce* shall not be restricted or interfered with by any contract, combination, or conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the states or of state corporations which, although not directly engaged themselves in *such commerce*, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress? \* \* \*

[After citing earlier cases arising under the Anti-Trust Act] It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations. \* \* \*

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act;

That Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in *such commerce*;

That every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate

trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce; \* \* \*

That under its power to regulate commerce among the several states and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. \* \* \* In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case, are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that, as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the states creating those corporations. This suggestion does not at all impress us. \* \* \* By its very terms the act regulates only commerce among the states and with foreign states. \* \* \*

It is said that whatever may be the power of a state over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a state corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens and state corporations are subject, if to any authority, only to the lawful authority of the state in which such citizens reside or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. \* \* \*

In this connection, it is suggested that the contention of the government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce if that corporation be engaged in interstate commerce. \* \* \* We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in

interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee, designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that combination to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs, when effected by a powerful combination, are more dangerous and require more stringent supervision than when they are to be effected by a single person? \* \* \*

The means employed in respect to the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for interstate and international commerce (not for domestic commerce) that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition. \* \* \*

Now the Court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this Court as to the scope and validity of the Anti-Trust Act. \* \* \*

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination described in the bill? All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this Court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the states and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Con-

stitution, the supreme law of the land, anything in the Constitution and laws of any state to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution, \* \* \*. No such view can be entertained for a moment. \* \* \* No state can, by merely creating a corporation, or in any other mode, project its authority into other states, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any state may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a state is necessarily subject to the supreme law of the land. \* \* \* The federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor diminish or increase, its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the states. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the states. The affirmation of the judgment below will only mean that no combination, however powerful, is stronger than the law, or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the states. \* \* \*

Affirmed.

[Mr. JUSTICE BREWER concurred in the result in an opinion which is omitted here.]

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE PECKHAM, and MR. JUSTICE HOLMES, dissenting.

\* \* \*

Does the delegation of authority to Congress to regulate commerce among the states embrace the power to regulate the ownership of stock

in state corporations, because such corporations may be in part engaged in interstate commerce? \* \* \* I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the states or intercourse between them. \* \* \* Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" \* \* \* Can it in reason be maintained that to prescribe rules governing the ownership of stock within a state, in a corporation created by it, is within the power to prescribe rules for the regulation of intercourse between citizens of different states?

But if the question be looked at with reference to the powers of the federal and state governments,—the general nature of the one and the local character of the other which it was the purpose of the Constitution to create and perpetuate,—it seems to me evident that the contention that the authority of the national government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority is absolutely destructive of the Tenth Amendment. \* \* \* This must follow, since the authority of Congress to regulate on the subject can, in reason, alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the states from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the states or to create a monopoly concerning the same. \* \* \*

Being of the opinion \* \* \* that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the Anti-Trust Act, as shown in the opinion of Mr. Justice Holmes, I dissent.

[MR. JUSTICE HOLMES, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE WHITE, and MR. JUSTICE PECKHAM, also delivered a dissenting opinion which is omitted.]

#### NOTES

1. It was not until the enactment of the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890 that Congress made any significant effort to exercise its powers under the commerce clause to regulate the national economy. The predominant purpose of the former statute was to prevent unreasonable and discriminatory rates. The constitutional basis for the enactment of anti-trust legislation is the power to protect interstate commerce from burdens and obstructions. Its principal objective was to check the growth of industrial trusts. But in the first important case to arise under it the Supreme Court held

that its provisions could not be constitutionally applied to a gigantic monopoly in the manufacture of sugar, since manufacture is not commerce and its regulation is a matter solely within the competence of the states. As regards the possible effects of monopolistic practices in manufacturing or production upon interstate commerce, the court said: "Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy." *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. 249 (1895).

But in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96 (1899) it was held that a combination in the manufacture, sale and transportation of iron pipe, where the purpose was to fix the price of the goods sold, was invalid under the Sherman Act, the court saying that "anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." And in *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. 276 (1905), where there was a combination of the large meat packers to restrain open bidding in the purchase of livestock in the stockyards, it was held by a unanimous court that there was a violation of the Sherman Act. Justice Holmes, distinguishing the Knight case, pointed out that even though the transactions involved standing alone were transactions in intrastate commerce, they were nevertheless caught up in that "current of commerce" flowing from the farms through the stockyards and slaughterhouses to the consuming public throughout the states of the union, the purchase of the cattle being a part and incident of such commerce.

In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 92 L. ed. 1328, 68 Sup. Ct. 996 (1948), holding that the Sherman Act covered an agreement in restraint of trade among California sugar beet refiners who constituted the only available market for sugar beets grown in their locality, so as to render the participants liable in treble damages to a sugar beet grower injured in consequence of such agreement, the court, through Justice Rutledge, reviewed the decisions under the act and made it clear that the rationale of the Knight case had been abandoned. He said: "The Knight decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal."

2. In *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 31 Sup. Ct. 502, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734 (1911) and *American Tobacco Co. v. United States*, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. 632 (1911), the Supreme Court applied the so-called "rule of reason" to the construction of the first section of the Sherman Act, holding that, as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the statute embraced only contracts or combinations which injured the public by unduly restricting competition, or unduly obstructing the natural course of trade, the language of the Act was intended by the lawmakers to have the same effect. See generally, Corwin, *The Anti-Trust Acts and the Constitution*, 18 Va. L. Rev. 355 (1932).

3. *Lorain Journal Co. v. United States*, 342 U. S. 143, 96 L. ed. 162, 72 Sup. Ct. 181 (1951) held that a newspaper's conduct in forcing local advertisers to

boycott a competing radio station for the purpose of eliminating the station and thereby regaining its monopoly of interstate commerce in the locality, constituted a violation of the Sherman Act and justified injunctive relief.

### BROOKS v. UNITED STATES.

Supreme Court of the United States, 1925.

267 U. S. 432, 69 L. ed. 699, 45 Sup. Ct. 345, 37 A. L. R. 1407.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a writ of error to the District Court for the District of South Dakota brought by Rae Brooks to reverse a judgment against him of conviction under two indictments for violation of the Act of Congress, of October, 1919, known as the National Motor Vehicle Theft Act. The writ of error issued under § 238 of the Judicial Code, because the case involves the construction or application of the Constitution, in that the chief assignment of error is the invalidity of the Act. The Act became effective October 29, 1919 (41 Stat. 324), and is as follows:

"Chap. 89.—An Act to punish the transportation of stolen motor vehicles in interstate or foreign commerce. \* \* \*

"Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both.

"Sec. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both.

"Sec. 5. That any person violating this act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The objection to the act cannot be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215. In *Reid v. Colorado*, 187 U. S. 137, it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other states. In the *Lottery Case* [*Champion v. Ames*], 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one state to another, in order to prevent the carriage of those tickets to be sold in other

states and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. In *Hipolite Egg Co. v. United States*, 220 U. S. 45, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which, if sold in other states than the one from which they were transported, would deceive or injure persons who purchased such articles. In *Hoke v. United States*, 227 U. S. 308, and *Caminetti v. United States*, 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one state to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. In *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311, it was held that Congress had power to forbid the introduction of intoxicating liquors into any state in which their use was prohibited, in order to prevent the use of interstate commerce to promote that which was illegal in the state. In *Weber v. Freed*, 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the state of destination.

In *Hammer v. Dagenhart*, 247 U. S. 251, it was held that a federal law forbidding the transportation of articles manufactured by child labor in one state to another was invalid because it was really not a regulation of interstate commerce but a congressional attempt to regulate labor in the state of origin by an embargo on its external trade. Articles made by child labor and transported into other states were harmless and could be properly transported without injuring any person who either bought or used them. In referring to the cases already cited, upon which the argument for the validity of the Child Labor Act (Comp. St. §§ 8819a-8819f) was based, this court pointed out that in each of them the use of interstate commerce had contributed to the accomplishment of harmful results to people of other states, and that the congressional power over interstate transportation in such cases could only be effectively exercised by prohibiting it. The clear distinction between authorities first cited and the Child Labor Case leaves no doubt where the right lies in this case. It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other state and their sale or other disposition far away from the owner and his neighborhood

have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another state helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions. \* \* \*

The judgment of the District Court is affirmed.

### NOTES

1. That the power to regulate interstate commerce includes not only the power to protect such commerce by the removal of burdens or obstructions from its channels but the power to prohibit the interstate transportation of certain interdicted articles or persons altogether is illustrated by the principal case. This power may be exercised, as in the principal case, in order to give effect to the policy of Congress, or, as the two cases which follow bring out, to assist the states in the execution of certain of their internal policies.

The Federal Kidnaping Act of 1932 makes it a crime knowingly to transport or cause to be transported in interstate or foreign commerce persons unlawfully seized by any means whatsoever and held for ransom or reward or otherwise. The Federal Stolen Property Act of 1934 forbids the transportation in interstate or foreign commerce of stolen or fraudulently taken goods, securities or money of the value of \$5,000 or more, knowing the same to have been stolen. The Fleeing Felon Act of 1934 makes it a federal offense for any person to move or travel in interstate or foreign commerce with intent to avoid prosecution for certain specified felonies, or to avoid giving testimony in any criminal proceeding in which the commission of a felony is charged. The National Firearms Act of 1934, regulating and taxing the transfer of certain types of firearms, penalizes the transportation in interstate commerce of unregistered firearms. The constitutional validity of these and other important statutes enacted under this interpretation of the commerce power of Congress has been upheld.

On the power of Congress to prohibit interstate commerce, see generally, Corwin, *Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue*, 18 *Corn. L. Q.* 477 (1933), 3 *Selected Essays on Constitutional Law* (1938), 103.

2. *United States v. Five Gambling Devices*, 346 U. S. 441, 98 L. ed. 179, 74 Sup. Ct. 190 (1953) were unsuccessful attempts, by two different procedures, to enforce the view of the Department of Justice that Congress had the power, in enacting the Act of January 2, 1951 (15 U. S. C. §§ 1171-1177; F. C. A. 15 §§ 1171-1177) prohibiting shipment of gambling devices in interstate commerce, to require, under criminal sanctions, dealers in such devices to register and to file information as to their sale, irrespective of whether the sales were made and the gambling devices moved in interstate commerce. Indictments charging dealers with violations of the act without alleging that the dealers moved gambling devices in interstate commerce or that the devices involved so moved were dismissed by a federal district court. In another proceeding the government brought a libel to forfeit gambling machines seized by federal agents; the libel did not show that these machines were at any time transported in interstate commerce. It also was dismissed. These dismissals were affirmed by a sharply divided court, the justices in the majority being unable to agree as to the ground

of decision. The dissenting justices (Warren, C. J., Reed, Burton and Clark) took the view that the statute was applicable, irrespective of any relation to interstate commerce of the dealers or devices involved, that it was not unconstitutionally vague, and was within the power of Congress over interstate commerce, since the regulation of the intrastate activities involved were appropriate means to the attainment of a legitimate end, i. e., the exercise of the power to regulate interstate commerce.

# CLARK DISTILLING CO. v. WESTERN MARYLAND R. CO.

Supreme Court of the United States, 1917.

242 U. S. 311, 61 L. ed. 326, 37 Sup. Ct. 180, L. R. A. 1917B,  
1218, Ann. Cas. 1917B, 845.

[Appeals from the District Court of the United States for the District of Maryland questioning the validity of the Webb-Kenyon Act (Act of Congress of March 1, 1913, 37 Stat. 699), stated in the opinion, and the validity of a statute of West Virginia which forbade any common carrier, for hire, and any other person, for hire or without hire, to carry or bring intoxicating liquor into the state.]

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court.

\* \* \* [After (1) interpreting the West Virginia statute as prohibiting receipt within the state, whether for personal use or otherwise, and (2) holding that it did not violate the Fourteenth Amendment by so doing, the opinion continues:]

This brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the state the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?*

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act divesting intoxicating liquors of their interstate character in certain cases.

"\* \* \* That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, \* \* \* into any other State, Territory, or District of the United States, \* \* \* which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any

law of such State, Territory, or District of the United States, \* \* \* is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the state whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended \* \* \* to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State," there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. \* \* \*

To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. 313) \* \* \*. And this was recognized by the long line of decisions which upheld that law and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced, that is, the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a state where what is known as the dispensary system prevailed. *Vance v. Vandercook Company*, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling \* \* \*.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce

the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. *Did Congress have power to enact the Webb-Kenyon Law?* \* \* \*

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several states, such action would have been lawful because within the power to regulate which the Constitution conferred. *Lottery Case*, 188 U. S. 321; *Hoke v. United States*, 227 U. S. 308. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the states by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity. Let us test the contentions by reason and authority. \* \* \*

The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibition to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. \* \* \*

So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity and which, although subject to the regulation of Congress, are in the absence of such regulation subject to the control of the several

states (*Cooley v. Board of Wardens*, 12 How. 299), and the other embracing subjects which do require uniformity and which in the absence of regulation by Congress remain free from all state control (*Leisy v. Hardin*, 135 U. S. 100). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the application of state power to any degree whatever, because in the absence of the exertion by Congress of power to regulate, the subject matter would have been free from state control, and because, besides, the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy v. Hardin*, *supra*. But that case, instead of supporting the contention, plainly refutes it for the following reasons: Although *Leisy v. Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. \* \* \*

And finally, after pointing out that the states had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the state, it was said that this limitation obtained "in the absence of congressional permission" to the state (p. 124). \* \* \*

As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state and selling it in violation of such law was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with *In re Rahrer*, 140 U. S. 545. As the power to regulate which was manifested in the Wilson Act and that which was

exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity. \* \* \*

We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power. \* \* \*

Affirmed.

MR. JUSTICE McREYNOLDS concurs in the result.

MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER dissent.

#### NOTE

1. The history of liquor legislation affords an interesting demonstration of the necessity and effectiveness of cooperation between the federal government and the states in regulating subjects which the states deem objectionable. In *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689 (1888) the Supreme Court held invalid under the commerce clause an Iowa statute, enacted in furtherance of the state's prohibition policy, prohibiting the transportation by a common carrier of intoxicating liquor into the state. *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. 681 (1890) further limited the power of the states by holding that intoxicating liquor shipped into a state was not within the reach of state laws prohibiting sale until after the original package was broken or sold by the consignee, the opinion adding, "unless placed there by congressional action." These cases led the advocates of prohibition to act upon the suggestion of the court that Congress supply a legislative remedy for the enforcement difficulties which its own decisions had created. The Wilson Act of 1890 provided that interstate shipments of liquor into any state should "upon arrival in such state" be subject to the police powers of the state, regardless of whether or not they remained in the original packages. This statute was upheld in *In re Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. 865 (1891), the court ruling that the act merely divested liquor transported in interstate commerce of its interstate character, leaving it subject to the power of the states over their internal commerce. "In so doing," said the court, "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course, and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."

As the opinion in the principal case indicates, however, the Wilson Act was interpreted quite literally to mean that state laws could take effect upon an interstate shipment of liquor only after arrival and delivery to the consignee. Thus while the consignee might be prohibited from selling it, he was free to

have it shipped into the state for his own consumption. *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. 664 (1898). The next step in the legislative drive to assist the states in their efforts to enforce a prohibition policy was the enactment of the Webb-Kenyon Act, held valid in the principal case.

In 1917, with the Reed "Bone-Dry" Amendment, Congress went still further by forbidding the shipment for personal use of intoxicating liquor into any state which forbade its manufacture or sale, even though the state permitted its introduction for such purpose in limited quantity. The effect of this legislation was thus to make the prohibition states more prohibitory than they elected to be. In sustaining this law the Supreme Court said that while Congress may use its commerce powers in aid of state policy, "it is equally clear that the policy of Congress, acting independently of the states, may induce legislation without reference to the particular policy or law of any given state." *United States v. Hill*, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. 143 (1919). For the legislative history of the Wilson and Webb-Kenyon Acts, see Dowling and Hubbard, *Divesting an Article of its Interstate Character*, 5 Minn. L. Rev. 100, 253 (1921).

The Twenty-first Amendment (§ 2) removes all limitations on the power of the states previously placed upon them by the commerce clause in legislating with respect to the interstate transportation of intoxicating liquor for delivery or use within their borders. The Amendment has been held to validate a state statute levying a license fee for the privilege of importing beer into the state, even though the state permits the domestic manufacture of beer. *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59, 81 L. ed. 38, 57 Sup. Ct. 77 (1936). A state retaliatory or protective law which forbids sale in the state of beer made in any other state the laws of which discriminate against beer made in the former state, is valid, a state's power to prohibit or regulate the importation of liquor being no longer limited by the commerce clause. *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391, 83 L. ed. 243, 59 Sup. Ct. 254 (1939). State statutes similar in nature regulating, with penal sanctions, the transportation of intoxicating liquor through the states were sustained as against objections that they encroached upon the commerce power of Congress, in *Duckworth v. Arkansas*, 314 U. S. 390, 86 L. ed. 294, 62 Sup. Ct. 311, 138 A. L. R. 1144 (1941) and *Carter v. Virginia*, 321 U. S. 131, 88 L. ed. 605, 64 Sup. Ct. 464 (1944). These decisions, however, were not rested on the Twenty-first Amendment. *Ziffrin v. Reeves*, 308 U. S. 132, 84 L. ed. 128, 60 Sup. Ct. 163 (1939) sustained a Kentucky statute which forbade transportation of whiskey from the state, as well as in the state, by any carrier not licensed by the state. For a discussion of how the Twenty-first Amendment made a fundamental change in the constitutional relations between the states and the nation with respect to the control of the liquor traffic, see *United States v. Frankfort Distilleries*, 324 U. S. 293, 89 L. ed. 951, 65 Sup. Ct. 661 (1945). See also, Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815 (1946).

### KENTUCKY WHIP & COLLAR CO. v. ILLINOIS CENTRAL R. CO.

Supreme Court of the United States, 1937.  
299 U. S. 334, 81 L. ed. 270, 57 Sup. Ct. 277.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This controversy relates to the constitutional validity of the Act of Congress of July 24, 1935, known as the Ashurst-Sumners Act. 49 Stat. 494.

The Act makes it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, sold, or used in violation of its laws. Goods made by convicts on parole or probation, or made in federal penal and correctional institutions for use by the Federal Government, are excepted. Packages containing convict-made goods must be plainly labeled so as to show the names and addresses of shipper and consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced. Violation is punished by fine and forfeiture.

Petitioner manufactures in Kentucky, with convict labor, horse collars, harness and strap goods which it markets in various States. It tendered to respondent, a common carrier, twenty-five separate shipments for transportation in interstate commerce, of which ten were consigned to customers in States whose laws prohibited the sale of convict-made goods within their respective borders, five to States whose laws did not prohibit such sale but required that the goods should be plainly marked so as to show that they were made by convicts, and the remaining ten to States whose laws imposed no restriction upon sale or possession. None of the packages were labeled as required by the Act of Congress and, in obedience to the Act, respondent refused to accept the shipments.

Petitioner then brought this suit for a mandatory injunction to compel the transportation. The District Court dismissed the bill and the Circuit Court of Appeals affirmed the decree. The District Court declared the Act to be invalid so far as it prohibited transportation of convict-made goods into States which proscribed sale or possession, but sustained the provision which required labeling. 12 Fed. Supp. 37. The Circuit Court of Appeals sustained the Act in its entirety. 84 F. (2d) 168. This Court granted certiorari.

Petitioner contends (1) that the Congress is without constitutional authority to prohibit the movement in interstate commerce of useful and harmless articles made by convict labor and (2) that the Congress has no power to exclude from interstate commerce convict-made goods which are not labeled as such.

First.—The commerce clause (Art. 1, sec. 8, par. 3) confers upon the Congress "the power to regulate, that is, prescribe the rule by which commerce is to be governed." This power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196. By the Act now before us, the Congress purports to establish a rule governing interstate transportation, which is unquestionably interstate commerce. The question is whether this rule goes beyond the authority to "regulate."

Petitioner's argument necessarily recognizes that in certain circumstances an absolute prohibition of interstate transportation is constitutional regulation. The power to prohibit interstate transportation has

been upheld by this Court in relation to diseased livestock, lottery tickets, commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier, adulterated and misbranded articles, under the Pure Food and Drugs Act, women, for immoral purposes, intoxicating liquors, diseased plants, stolen motor vehicles and kidnaped persons. [Citations omitted.]

The decisions sustaining this variety of statutes disclose the principles deemed to be applicable. We have frequently said that in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215; *Hoke v. United States*, 227 U. S. 308, 323; *Seven Cases v. United States*, 239 U. S. 510, 515. The power was defined in broad terms in *Brooks v. United States*, 267 U. S. 432, 436, 437: "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power for the benefit of the public, within the field of interstate commerce."

The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Oregon-Washington R. & N. Co. v. Washington*, 270 U. S. 87, 99. Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. *Champion v. Ames*, 188 U. S. 321, 358; *Hoke v. United States*, *supra*; *Cincinnati v. United States*, 242 U. S. 470, 486. The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 415. And, while the power to regulate interstate commerce resides in the Congress, which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. *Brooks v. United States*, *supra*; *Gooch v. United States*, 297 U. S. 124.

The contention is inadmissible that the Act of Congress is invalid merely because the horse collars and harness which petitioner manufactures and sells are useful and harmless articles. The motor vehicles, which are the subject of the transportation prohibited in the National Motor Vehicle Theft Act, are in themselves useful and proper subjects of commerce, but their transportation by one who knows they have been stolen is "a gross misuse of interstate commerce" and the Congress may properly punish it "because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into

other jurisdictions." *Brooks v. United States*, supra, p. 439. Similarly, the object of the Federal Kidnaping Act is to aid in the protection of the personal liberty of one who has been unlawfully seized or carried away. *Gooch v. United States*, supra; compare *United States v. Wheeler*, 254 U. S. 281.

On the same general principle, the Congress may prevent interstate transportation from being used to bring into a State articles the traffic in which the State has constitutional authority to forbid, and has forbidden, in its internal commerce. In that view, we sustained the acts of Congress designed to prevent the use of interstate transportation to hamper the execution of state policy with respect to traffic in intoxicating liquors. This was not because intoxicating liquors were not otherwise legitimate articles of commerce. On the contrary they were recognized as such "by the usages of the commercial world, the laws of Congress and the decisions of courts". \* \* \*

The course of congressional legislation with respect to convict-made goods has followed closely the precedents as to intoxicating liquors. By the Hawes-Cooper Act of January 19, 1929, the Congress provided that convict-made goods (with certain exceptions) transported into any State should be subject upon arrival, whether in the original packages or otherwise, to the operation of state laws as if produced within the State. In *Whitfield v. Ohio*, 297 U. S. 431, petitioner was charged in the state court in Ohio with selling convict-made goods in violation of the state law. It appeared that the goods had been sold in the original packages as shipped in interstate commerce and that there was "nothing harmful, injurious or deleterious" about them. But this Court said that the view of the State of Ohio, that the sale of convict-made goods in competition with the products of free labor was an evil, found ample support in fact and in the similar legislation of a preponderant number of other States. The Court observed that the Congress had prohibited the importation of the products of convict labor. All such legislation, state and federal, proceeded upon the view "that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison." The Court upheld the power of the State, so far as the Federal Constitution is concerned, to base nondiscriminatory legislation upon that conception, and as it appeared that the Ohio statute would be unassailable if made to take effect after sale in the original package, the statute was held to be equally unassailable in the light of the provisions of the Hawes-Cooper Act. As to the validity of the latter Act, the Court followed the decision in *In re Rahrer*, 140 U. S. 545, in relation to the Wilson Act.

The Ashurst-Sumners Act as to interstate transportation of convict-made goods has substantially the same provisions as the Webb-Kenyon Act as to intoxicating liquors and finds support in similar considerations. The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same. The

pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.

In the congressional action there is nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law. The Congress in exercising the power confided to it by the Constitution is as free as the States to recognize the fundamental interests of free labor. Nor has the Congress attempted to delegate its authority to the States. The Congress has not sought to exercise a power not granted or to usurp the police powers of the States. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power which is subject to no limitation other than that which is found in the Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection.

Second.—As the Congress could prohibit the interstate transportation of convict-made goods as provided in section one of the Act, the Congress could require packages containing convict-made goods to be labeled as required by section two. The requirement of labels, disclosing the nature of the contents, the name and location of the penal institution where the goods were produced, and the names and addresses of shippers and consignees, was manifestly reasonable and appropriate for the carrying out of the prohibition. *Seven Cases v. United States*, *supra*; *Freeman v. United States*, 239 U. S. 117; *Weeks v. United States*, 245 U. S. 618, 622. \* \* \*

The decree is affirmed.

Affirmed.

#### NOTES

1. See Ribble, *National and State Cooperation Under the Commerce Clause*, 37 Col. L. Rev. 43 (1937).

2. In a case arising out of a suit by which the State of Washington sought to collect from the International Shoe Company a contribution or tax payable into the state's unemployment insurance fund, the tax to be equivalent to a stated percentage of the wages paid the employees, it appeared that the only employees this company had in the state were agents that did nothing but solicit orders for goods to be subsequently shipped into the state from this foreign corporation's factory in another state. Admittedly the employees' acts in the state were exclusively acts of interstate commerce, and the claim was made that this exaction of contributions to the fund imposed a burden on such commerce. But the Supreme Court, through Chief Justice Stone, after pointing out that the federal statute (26 U. S. C. § 1606 (a); F. C. A. 26 § 1606 (a)) provides that "no person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce and

those engaged in intrastate commerce," said: "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." Among the several cases cited in support of this statement was the *Kentucky Whip and Collar Co. case*. *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. ed. 95, 66 Sup. Ct. 154, 161 A. L. R. 1057 (1945).

## SECOND EMPLOYERS' LIABILITY CASES.

Supreme Court of the United States, 1912.

223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44.

[Error to the Supreme Court of Errors of Connecticut and to the United States Circuit Courts for the Districts of Minnesota and Massachusetts. The three cases were suits against railroads for personal injuries to employees, brought under the federal Employers' Liability Act of 1908 (35 Stat. 65, c. 149) which declared that "every common carrier by railroad, while engaging in commerce between any of the several states or territories, \* \* \* shall be liable in damages [for injury or death suffered by any person] while he is employed by such carrier in such commerce, \* \* \* such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment." Beneficiaries of the action were designated in case of death, and provision was made for survival of the action to designated persons. The defenses of fellow service, contributory negligence, and assumed risk were abrogated or modified, as indicated in the opinion. The Connecticut court declared the Act invalid and the other courts upheld it.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

\* \* \*

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several states" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

3. "To regulate," in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument

and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads, over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. \* \* \*

In view of these settled propositions, it does not admit of doubt that \* \* \* Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk, have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged. \* \* \*

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a propor-

tional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives. \* \* \*

Of the objection to these changes it is enough to observe: \* \* \*

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. \* \* \*

We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. \* \* \*

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co. v. United States*, 222 U. S. 20, 27, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in *Employers' Liability Cases*, 207 U. S. 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the casual negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein. \* \* \*

[The judgment of the Connecticut court was reversed and those of the Circuit Courts of the United States for Minnesota and Massachusetts were affirmed.]

### NOTES

1. The first Federal Employers' Liability Act of 1906 was held unconstitutional because it made employers responsible not only to employees engaged in interstate commerce, but to any employees, whether engaged in interstate or intrastate commerce. *Employers' Liability Cases*, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141 (1908).

2. The Hours of Service Act of 1907, which forbade the employment of railroad trainmen, engaged in interstate transportation, more than sixteen consecutive hours, was sustained in *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. 621 (1911). The court said that the length of hours of service has "direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends" and that it was competent for Congress to consider, and attempt to curtail, the dangers to employees incident to the strain of excessive hours of duty.

3. Congress can prescribe the number of hours per day or week that railway employees shall be permitted to work in interstate commerce, and prescribe the wages to be paid them during a period of emergency, when because of a failure of employers and employees to agree upon a scale of wages a strike of such employees throughout the United States is threatened, which would stop interstate transportation. *Wilson v. New*, 243 U. S. 332, 61 L. ed. 755, 37 Sup. Ct. 298, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024 (1917).

### SOUTHERN RAILWAY CO. v. UNITED STATES.

Supreme Court of the United States, 1911.  
222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. 2.

Error to the District Court of the United States.

[This was a civil action by the United States to recover penalties for hauling five cars having defective couplers in violation of the federal Safety Appliance Act, which as amended March 2, 1903, 32 Stat. 943, c. 976, applied to all cars used on "any railroad engaged in interstate commerce." The defendant's road was used for both interstate and intrastate transportation. The trial court gave judgment for penalties as to all five cars, three of which were moving intrastate traffic only and it did not appear that they were being hauled in connection with any car or cars moving interstate traffic.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

\* \* \*

It must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving

interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative.

Judgment affirmed.

## NOTE

1. When Congress, in 1934, passed an act establishing a compulsory retirement and pension system for employees of railroads subject to the Interstate Commerce Act, to be financed by the carriers and their employees and administered by a federal agency, the Supreme Court, in a five-to-four decision, held the statute void as not falling within the congressional power to regulate commerce and as violative of the due process clause of the Fifth Amendment. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 330, 79 L. ed. 1468, 55 Sup. Ct. 758 (1935). The majority opinion, by Justice Roberts, said that the purpose of the legislation was outside the scope of the commerce clause because the employment of superannuated trainmen did not endanger efficiency of operations and that there was no relationship between the assurance of security for the workers' old age and employee morale. Chief Justice Hughes, dissenting with the concurrence of Justices Brandeis, Stone and Cardozo, said that this result was "a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution." To the dissenting justices it was clear that the morale of railroad employees has an important bearing upon the efficiency of the interstate transportation service, and that a reasonable pension plan by its assurance of security is an appropriate means to that end. At best, the question as to the extent of superannuation, and its effect, was a debatable one, and hence one upon which Congress was entitled to form a legislative judgment. See Powell, *Commerce, Pensions, and Codes*, 49 Harv. L. Rev. 1, 193 (1935).

Following the decision in the Alton case, Congress passed two acts, one imposing excise taxes upon railroad carriers and their employees, the money to be paid into the treasury of the United States but not to be set up as a separate fund, the other providing for payment of annuities to railroad employees from the treasury. These acts sought to avoid the exercise of the commerce power and to rely upon the taxing and spending powers of Congress. This legislation was revised in 1946 (26 U. S. C. § 1500 *et seq.*; F. C. A. 26 § 1500 *et seq.*) and the validity of the earlier legislative technique was never judicially tested.

The rationale of the Alton decision was repudiated in *United States v. Lowden*, 308 U. S. 225, 84 L. ed. 208, 60 Sup. Ct. 248 (1939), where the court sustained the authority of the Interstate Commerce Commission, in a railroad consolidation proceeding under the Transportation Act of 1920, to require as a condition for approval of a lease of railroad property by one railroad company to another that the lessee comply with certain terms intended to distribute part of the savings of the new operating arrangement to those workers who would incur financial loss from its being put into effect. Such losses included salary reductions incident to seniority shifts affecting retained employees, reimbursement of the moving expenses of employees transferred to new locations, together with losses incurred by the latter group through being forced to sell their homes. The court, through Justice Stone, said: "One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed upon them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system." Referring to the Alton case the court said that "notwithstanding what was said there" it could not say that the "congressional judgment that those conditions have a relation to the public interest as defined by the statute is without rational basis."

RAILROAD COMMISSION OF WISCONSIN v. CHICAGO,  
BURLINGTON & QUINCY R. CO.

Supreme Court of the United States, 1922.

257 U. S. 563, 66 L. ed. 371, 42 Sup. Ct. 232, 22 A. L. R. 1086.

The proceeding out of which this case has grown, known as the "Wisconsin Passenger Fares," began in an investigation by the Interstate Commerce Commission, under paragraphs 3 and 4 of § 13 of the Interstate Commerce Act as amended by § 416 of the Transportation Act of 1920 (41 Stat. 484), into alleged undue and unreasonable discrimination against interstate commerce arising out of intrastate railroad rates in Wisconsin. The interstate carriers by steam railroad of the state were made respondents, and the Governor and State Railroad Commission were duly notified. The Interstate Commerce Commission made its report and order November 27, 1920. Wisconsin Passenger Fares, 59 I. C. C. 391.

The Commission had investigated the interstate rates of carriers in the United States, in a proceeding known as Ex parte 74, Increased Rates, 58 I. C. C. 220, for the purpose of complying with § 15a of the Interstate Commerce Act, as amended by § 422 of the Transportation Act of 1920 (41 Stat. 488). That section requires that the Commission so adjust rates that the revenues of the carriers shall enable them as a whole or by groups to earn a fixed net income on their railway property. The Commission ordered an increase for the carriers in the group of which the Wisconsin carriers were a part, of 35 per cent. in interstate freight rates, and 20 per cent. in interstate passenger fares and excess baggage charges, and a surcharge upon passengers in sleeping cars amounting to 50 per cent. of the charge for space in such cars to accrue to the rail carriers. Thereupon the carriers applied to the Wisconsin Railroad Commission for corresponding increases in intrastate rates. The state commission granted increases in intrastate freight rates of 35 per cent., but denied any in intrastate passenger fares and charges on the sole ground that a state statute prescribed a maximum for passengers of 2 cents a mile.

In the Wisconsin Passenger Fares, the Interstate Commerce Commission found that all of the respondent carriers of Wisconsin transported both intrastate and interstate passengers on the same train, with the same service and accommodations; that the state passenger paying the lower rate rode on the same train, in the same car, and perhaps in the same seat with the interstate passenger who paid the higher rate; that the circumstances and conditions were substantially similar for interstate as for intrastate passenger service in Wisconsin; that travelers destined to, or coming from, points outside the state, found it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare; that undue preference and prejudice were shown by the falling off of sales of

tickets from border line points in Minnesota and Michigan to stations in Wisconsin, and by a marked increase in sales of local tickets from corresponding border line points in Wisconsin to stations in Wisconsin; that the evidence as to the practice with respect to passenger fares applied in like manner to the surcharge upon passengers in sleeping and parlor cars and to excess baggage charges.

The Commission further found that the fare necessary to fulfil the requirement as to net income of this interstate railroad group under § 15a was 3.6 cents per mile, and that this was reasonable, that the direct revenue loss to the Wisconsin carriers, due to their failure to secure the 20 per cent. increase in intrastate fares, would approximate \$2,400,000 per year if the 3-cent fare fixed by the President under federal war control were continued, and \$6,000,000 per year if the 2-cent fare named in the state statute should become effective.

[Thereupon the Commission fixed a minimum for intrastate passenger fares in Wisconsin at 3.6 cents per mile. The carriers filed bills in the United States District Court to enjoin the State Railroad Commission and other state officials from interference with their charging the rates thus fixed, and applied for an interlocutory injunction. From a decree granting the latter this appeal was taken.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court. \* \* \*

Paragraph 4 of § 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 \* \* \* authorizes the Interstate Commerce Commission, after a prescribed investigation, to remove "Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." \* \* \*

Second. The report of the Commission shows that if the intrastate passenger fares in Wisconsin are to be limited by the statute of that state to 2 cents per mile, and charges for extra baggage and sleeping car accommodations are to be reduced in corresponding degree, the net income of the interstate carriers of the state will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates. Under \* \* \* the Transportation Act of 1920 are such reduction and disparity an "undue, unreasonable or unjust discrimination against interstate or foreign commerce" which the Interstate Commerce Commission may remove by raising the intrastate fares? A short reference to the circumstances inducing the legislation and a summary of its relevant provisions will aid the answer to this question.

The Interstate Commerce Act of 1887, 24 Stat. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous

machinery of the original law to defeat its purpose, and this led to various amendments culminating in the amending Act of 1910, 36 Stat. 539, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the federal government, and by joint use of facilities, which the Anti-Trust Law was thought to forbid under private management, and by use of government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the federal government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

Under Title II it made provision for the termination of federal control March 1, 1920, for the refunding of the carriers' indebtedness to the United States, and for a guaranty for six months to the carriers of an income equal to the war-time rental for their properties, and directed that for two years following the termination of federal control, the Secretary of the Treasury, upon certificate of the Commission might make loans to the carriers not exceeding the maximum amount recommended in the certificate, out of a revolving fund of \$300,000,000.

Under Title IV amendments were made to the Interstate Commerce Act which included § 13, paragraphs 3 and 4, and § 15a, \* \* \*. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this court in the Shreveport and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two

years, the return is to be  $5\frac{1}{2}$  per cent., with  $\frac{1}{2}$  per cent. for improvements, and thereafter is to be fixed by the Commission.

The act sought to avoid excessive incomes accruing, under the operation of § 15a, to the carriers better circumstanced by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and, 3rd, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act.

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill.

Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates," *i. e.*, powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, § 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign com-

merce," it is impossible to escape the dovetail relation between that provision and the purpose of § 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words. \* \* \*

It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this, the same answer must be made as was made in the Shreveport Case (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso. \* \* \*

Counsel for the appellants have not contested the constitutional validity of the statute construed as we have construed it, although the counsel for the state commissions whom we permitted to file briefs as *amici curiae* have done so. The principles laid down by this court in the Minnesota Rate Cases, 230 U. S. 352, 432, 433, the Shreveport Case, 234 U. S. 342, 351, and the Illinois Central Case, 245 U. S. 493, 506, which are rates cases, and in the analogous cases of *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Ry. Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, 223 U. S. 1, 48, 51, we think, leave no room for discussion on this point. Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v.*

Shaw, 204 U. S. 24; Luxton v. North River Bridge Co., 153 U. S. 525; California v. Central Pacific R. R. Co., 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce, it deems necessary or desirable. This is because of the supremacy of the national power in this field. \* \* \*

It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce. \* \* \*

The order of the District Court granting the interlocutory injunction is Affirmed.

#### NOTES

1. Federal regulation of intrastate railroad rates where necessary in order to remove discriminations against interstate commerce resulting from the level at which such rates are maintained by the states is an application of the principle that Congress may protect interstate commerce not merely from the activities of those directly engaged therein but also from adverse state action. *Houston, East & West Texas R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. 833 (1914)—the *Shreveport Rate Case*—was the first decision of the Supreme Court upholding the exertion of federal power in this respect.

2. In *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, 68 L. ed. 388, 44 Sup. Ct. 169, 33 A. L. R. 472 (1924), in sustaining the "recapture clause" of the Transportation Act of 1920, which provided for the use of the excess profits of some railroads for the benefit of those which were unable to get a fair return on their investment under the rates established for them by the Interstate Commerce Commission, the court said: "If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold one-half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan." See also *Colorado v. United States*, 271 U. S. 153, 70 L. ed. 878, 46 Sup. Ct. 452 (1926), upholding the power of the Interstate Commerce Commission to authorize an interstate rail carrier to abandon an unprofitable intrastate branch line of its operations.

## STAFFORD v. WALLACE.

Supreme Court of the United States, 1922.

258 U. S. 495, 66 L. ed. 735, 42 Sup. Ct. 397, 23 A. L. R. 229.

[These cases were appeals from orders of the United States District Court for the northern district of Illinois refusing to grant interlocutory injunctions against the Secretary of Agriculture. They involved the constitutionality of the Packers and Stockyards Act of 1921, so far as that Act provided for the supervision by the federal government of the business of the commission men and livestock dealers in the great stockyards of the country.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court. \* \* \*

The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice. An appeal is given to the Circuit Court of Appeals from these findings and orders. They are to be enforced by the District Court by penalty if not appealed from and if disobeyed. Title III concerns the stockyards and provides for the supervision and control of the facilities furnished therein in connection with the receipt, purchase, sale on commission basis, or otherwise, of livestock, and its care, shipment, weighing, or handling in interstate commerce. A stockyard is defined to be a place conducted for profit as a public market, with pens in which livestock are received and kept for sale or shipment in interstate commerce. Yards with a superficial area less than 20,000 square feet are not within the Act. Stockyard owners, commission men, and dealers are recognized and defined, and the two latter are required to register. The Act requires that all rates and charges for services and facilities in the stockyards and all practices in connection with the livestock passing through the yards shall be just, reasonable, nondiscriminatory, and nondeceptive, and that a schedule of such charges shall be kept open for public inspection, and only be changed after ten days' notice to the Secretary of Agriculture, who is made a tribunal to inquire as to the justice, reasonableness, and nondiscriminatory or nondeceptive character of every charge and practice, and to order that it cease, if found to offend, with the same provisions for appeal and enforcement in court as in the case of offending packers. The Secretary is given power to make rules and regulations to carry out the provisions, to fix rates, or a minimum or maximum thereof, and to prescribe how every packer, stockyard owner, commission man, and dealer shall keep accounts. \* \* \*

The object to be secured by the Act is the free and unburdened flow of livestock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the livestock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose livestock are being cared for and sold in the stockyards market, is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers, who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner in the neglect of the livestock, in the mala fides of the sale, in the exorbitant prices obtained, and in the unreasonableness of the charges for services rendered.

The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and move out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and

this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the livestock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The Act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. \* \* \* The only question here is whether the business done in the stockyards, between the receipt of the livestock in the yards and the shipment of them therefrom, is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this Court and had great consideration in *Swift v. United States*, 196 U. S. 375. \* \* \* [There the Court said:]

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle."

The application of the commerce clause of the Constitution in the *Swift* Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This Court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

The principles of the Swift Case have become a fixed rule of this court in the construction and application of the commerce clause. Its latest expression on the subject is found in *Lemke v. Farmers Grain Co.*, 258 U. S. 50. In that case it was held, on the authority of the Swift Case, that the delivery and sale of wheat by farmers to local grain elevators in North Dakota, to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped, and the price was fixed by that in the Minneapolis market, less profit and freight, constituted a course of business, and determined the interstate character of the transaction. Accordingly a state statute, which sought to regulate the price and profit of such sales, and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause. \* \* \*

Of course, what we are considering here is not a bill in equity or an indictment charging conspiracy to obstruct interstate commerce, but a law. The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the Swift Case, certainly it may provide regulation to prevent their formation. The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

In *United States v. Ferger*, 250 U. S. 199, the validity of an act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce was in question. It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this court, speaking through Chief Justice White, answered the objection by saying:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because

we think it clear that if the proposition were sustained, it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564), and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." \* \* \*

As already noted, the word "commerce," when used in the Act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the Act clearly within Congressional power and valid. \* \* \*

The orders of the District Court refusing the interlocutory injunctions are Affirmed.

MR. JUSTICE McREYNOLDS dissents.

#### NOTES

1. The Grain Futures Act of 1922, regulating boards of trade and members thereof engaged in sales of grain for future delivery, was upheld as a valid regulation of interstate commerce in *Board of Trade v. Olsen*, 262 U. S. 1, 67 L. ed. 839, 43 Sup. Ct. 470 (1923). In sustaining the law, the court noted the findings of congressional committees that such trading in "futures" is affected with a national public interest and that it results in unreasonable fluctuation in the price structure, thus acting as an obstruction to and burden upon such commerce.

2. The federal government may fix the rate of commission to be charged by stockyards commission-men on sales of cattle made by them as agents. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 74 L. ed. 524, 50 Sup. Ct. 220 (1930), the court saying: "Plaintiffs perform an indispensable service in the interstate commerce in livestock. They enjoy a substantial monopoly at the Omaha stockyards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges, regardless of the differences in experience, skill, and industry. The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce."

3. Acting under authority of the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture issued an order regulating the handling of milk in the New York metropolitan area. This order was based upon findings that two-thirds of the milk produced for the New York marketing area moved in interstate commerce and that the remaining one-third produced within New York was "physically and inextricably intermingled" with the interstate milk; and that all was handled either in the current of interstate commerce or so as to affect such commerce in milk and its products. The Secretary's order fixing a minimum price for milk was sustained in *United States v. Rock Royal Co-Operative*, 307 U. S. 533, 83 L. ed. 1446, 59 Sup. Ct. 993 (1939), the court holding that in interstate commerce Congress has the same power as that enjoyed by the states in the regulation of prices for the handling and selling of commodities within their internal commerce. Three years later it was held that this act validly authorized the fixing of minimum producer prices for milk destined for consumption in the same state, the reason being that the regulation of the price

of milk moving in interstate commerce extends to such control of intrastate transactions as is necessary to make the act effective and includes the authority to make regulations for the marketing of intrastate milk where its sale and competition with interstate milk affects the general price structure, thus interfering with congressional policy. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 86 L. ed. 726, 62 Sup. Ct. 523 (1942). Federal control of production through establishing marketing quotas in interstate commerce, as provided for in the Agricultural Adjustment Act of 1938, was sustained in *Mulford v. Smith*, 307 U. S. 38, 83 L. ed. 1092, 59 Sup. Ct. 648 (1939).

4. On the "current" or "flow" of commerce concept approved in *Stafford v. Wallace*, see Ribble, *The "Current of Commerce": A Note on the Commerce Clause and the National Industrial Recovery Act*, 18 Minn. L. Rev. 296 (1934), 3 *Selected Essays on Constitutional Law* (1938), 184.

### NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION.

Supreme Court of the United States, 1937.

301 U. S. 1, 81 L. ed. 893, 57 Sup. Ct. 615, 108 A. L. R. 1352.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935, the National Labor Relations Board found that the petitioner, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. 83 F. (2d) 998. We granted certiorari.

The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to

eliminate these causes of obstruction to the free flow of commerce. The Act then defines the terms it uses, including the terms "commerce" and "affecting commerce." Sec. 2. It creates the National Labor Relations Board and prescribes its organization. Secs. 3-6. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. Sec. 7. It defines "unfair labor practices." Sec. 8. It lays down rules as to the representation of employees for the purpose of collective bargaining. Sec. 9. The Board is empowered to prevent the described unfair labor practices affecting commerce and the Act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its order. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on application to the court shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. \* \* \*

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; \* \* \*

The facts as to the nature and scope of business of the Jones & Laughlin Steel Corporation have been found by the Labor Board and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore and Ohio Railroad systems. It owns the

Aliquippa and Southern Railroad Company which connects the Aliquippa works with the Pittsburgh and Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis,—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semi-finished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases and operates stores, warehouses and yards for the distribution of equipment and supplies for drilling and operating oil and gas mills and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent. of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons. \* \* \*

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved power of the States over their local concerns. \* \* \*

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in Section 10(a), which provides:

"Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers (sec. 2 (6)):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or

the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (sec. 2(7)):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. \* \* \* Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

\* \* \*

Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. [Citing decisions.] \* \* \*

[Respondent also contended that the "stream" or "flow" of commerce cases, such as *Stafford v. Wallace*, were not controlling because:]

The raw materials which are brought to the [Aliquippa] plant are delayed for long periods and, after being subjected to manufacturing processes "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end." \* \* \*

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power

which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" \* \* \* Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. \* \* \*

That intrastate activities, by reason of close and intimate relations to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. [Citations omitted.] \* \* \*

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. In the Standard Oil and American Tobacco cases, 221 U. S. 1, 106, that statute was applied to combinations of employers engaged in productive industry. \* \* \*

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. *Loewe v. Lawlor*, 208 U. S. 274; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *Bedford Cut Stone Co. v. Stonecutters Association*, 274 U. S. 29. See, also, *Local 167 v. United States*, 291 U. S. 293, 297; *Schechter Corporation v. United States*, 295 U. S. 495. The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first *Coronado* case, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers v. Herkert*, 265 U. S. 457; *Industrial Association v. United States*, 268 U. S. 64, and *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 107. But in the first *Coronado* case the Court also said that "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." 259 U. S. p. 408. And

in the second Coronado case the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the "intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. *Industrial Association v. United States*, 268 U. S. p. 81. What was absent from the evidence in the first Coronado case appeared in the second and the Act was accordingly applied to the mining employees.

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra*, we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our federal system. In the *Carter* case, *supra*, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress

may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of *Virginian Railway Co. v. System Federation*, No. 40, 300 U. S. 515, points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act "when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." That, on the other hand, "a prolific source of dispute had been the maintenance by the railroad of company unions and the denial by railway management of the authority of representatives chosen by their employees." The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of re-

spondent's employees to self-organization and freedom in the choice of representatives for collective bargaining. \* \* \*

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE McREYNOLDS delivered the following dissenting opinion.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and I are unable to agree with the decisions just announced [including with the Jones & Laughlin Case, the decisions in National Labor Relations Board v. Fruehauf Trailer Co. and National Labor Relations Board v. Friedman-Harry Marks Clothing Co.] \* \* \*

The Court as we think departs from well-established principles followed in *Schechter v. United States*, 295 U. S. 495 and *Carter v. Carter Coal Co.*, 298 U. S. 238. Upon the authority of those decisions, the Circuit Court of Appeals of the Fifth, Sixth and Second Circuits in the causes now before us have held the power of Congress under the commerce clause does not extend to relations between employers and their employees engaged in manufacture, and therefore the Act conferred upon the National Labor Relations Board no authority in respect of matters covered by the questioned orders. \* \* \* No decision or judicial opinion to the contrary has been cited, and we find none. Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years. And the lower courts rightly deemed them controlling. \* \* \*

The three respondents happen to be manufacturing concerns—one large, two relatively small. The Act is now applied to each upon grounds common to all. Obviously what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety of private enterprises—mercantile, manufacturing, publishing, stock-raising, mining, etc. It puts into the hands of a Board power of control over purely local industry beyond anything heretofore deemed permissible. \* \* \*

That Congress has power by appropriate means, not prohibited by the Constitution, to prevent direct and material interference with the conduct of interstate commerce is settled doctrine. But the interference struck at must be direct and material, not some mere possibility contingent on wholly uncertain events; and there must be no impairment of rights guaranteed. A state by taxation on property may indirectly but seriously affect the cost of transportation; it may not lay a direct tax upon the receipts from interstate transportation. The first is an indirect effect, the other direct. \* \* \*

The things inhibited by the Labor Act relate to the management of a manufacturing plant—something distinct from commerce and subject to the authority of the state. And this may not be abridged because of

some vague possibility of distant interference with commerce. \* \* \*

The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the Act now upheld. A private owner is deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed.

It seems clear to us that Congress has transcended the powers granted.

#### NOTES

1. Two years before the decision in the principal case the Supreme Court held without dissent that the Codes of Fair Competition, each proposed by members of an industry to be governed by it, and to become operative when approved by the President, were void because the National Industrial Recovery Act of 1933, in authorizing that method of code-making, did not prescribe any standard to limit the exercise of executive discretion as to the contents of a code, and therefore the statute had attempted an unconstitutional delegation by Congress of its legislative power. *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. ed. 1570, 55 Sup. Ct. 837, 97 A. L. R. 947 (1935). What we are concerned with at this point, however, is that the court, without dissent, held as an alternative ground of decision that Congress had no power under the commerce clause, even by a proper delegation or by direct legislation, to enact the provisions of the code for the live poultry industry of the metropolitan area in and about New York City, outlawing certain unfair trade practices and setting minimum wages and maximum hours of employees in this industry. The significance of this decision turns on the facts about this industry. These were that the members of the industry were wholesalers who sold live poultry, and after slaughtering it delivered it to retailers in the area. Ninety-six per cent of the live poultry handled by these wholesalers was shipped into New York from other states. The out-of-state sellers, however, shipped to commission men from whom the wholesalers bought after arrival in New York. The court took the view that neither the wholesalers' purchases nor their resales were interstate commerce transactions, declaring that the "current" or "flow" doctrine was inapplicable since the flow of commerce had ceased prior to the transactions involved. The remaining question was, did the practices of these wholesalers sufficiently *affect* interstate commerce to bring them within the regulatory power of Congress. That depended, said Chief Justice Hughes, with six justices concurring, upon whether these practices "directly" affected interstate commerce. The opinion stated: "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle." Purporting to apply this clear principle, the conclusion was that unfair sales practices of these wholesalers and possible underpay and overwork of their employees would have no "direct" effect upon the movement of chickens from out-of-state producers to the consumers in New York. Justice Cardozo, joined by Justice Stone, concurred, saying that the commerce clause objection was "far-reaching and incurable, aside from any defect of unlawful delegation." The *Schechter* case and subsequent major decisions involving the scope of the commerce power of Congress are discussed in Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 Harv. L. Rev. 645, 883 (1946).

2. In *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, 56 Sup. Ct. 855 (1936) a six-to-three majority of the court held that Congress had no power to establish collective bargaining in coal mines or to regulate the hours and wages of coal miners, as it had attempted to do in the Bituminous Coal Conservation Act of 1935. The act provided for the establishment of a Bituminous Coal Commission with authority to formulate a code fixing prices, when deemed necessary in the public interest, and declared, among other labor provisions, that wage contracts negotiated between specified percentages of the producers and mine workers should be accepted by all the code members. Justice Sutherland, for the court, after stating that the distinction between a "direct" and "indirect" effect upon interstate commerce is not "formal" but "substantial in the highest degree," said: "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But \* \* \* the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation." The majority held, further, that the price-fixing provisions of the code were so related to and dependent upon the labor provisions that the invalidity of the latter infected the former, in spite of the inclusion of a separability clause in the statute. Chief Justice Hughes, concurring as regards the labor provisions, thought that the price-fixing provisions were separable and constitutional. Justices Cardozo, Brandeis and Stone also thought the price-fixing provisions valid and the suits premature insofar as they sought a decision as to the validity of the labor provisions.

The Bituminous Coal Act of 1937, which provided for the fixing of minimum prices but omitted all labor provisions, was sustained in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. ed. 1263, 60 Sup. Ct. 907 (1940).

3. The Supreme Court having upheld the constitutionality of the National Labor Relations Act in the principal case, it remains a question of fact in each case whether a particular person, firm or corporation falls within the interstate commerce jurisdictional limitations of the act and whether the unfair labor practices prohibited by the act as constituting obstructions to commerce have been carried on. Two other cases decided the same day involved much smaller industrial units than that of Jones & Laughlin Steel Corporation.

*National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 81 L. ed. 918, 57 Sup. Ct. 642 (1937) sustained the applicability of the Act to the labor relations of the respondent company and its employees in its manufacturing plant in Detroit. The findings of the National Labor Relations Board were that the company was the largest manufacturer of automobile trailers in the United States; that it maintained thirty-one branch sales offices in twelve states; that 50 per cent in value of the materials used and most of its lumber were transported from other states to Detroit; that more than 80 per cent of its products were shipped to other states and to foreign countries. The Board also had found that respondent had "determined to put a stop to all attempts on the part of its factory workers to form an efficient independent bargaining agency and in furtherance of that purpose summarily discharged nine men and threatened three others with discharge." The case was held to be governed by the principles laid down in the Jones & Laughlin decision, the same justices dissenting as dissented in that case.

In *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 81 L. ed. 921, 57 Sup. Ct. 645 (1937) the findings were that respondent company was engaged, at Richmond, Virginia, in the purchase of raw materials, principally woolen and worsted goods, and in the manufacture, sale and distribution of men's clothing; that most of these materials came from states other than Virginia and 82.8 per cent of the garments were shipped outside the

state; that the men's clothing industry is nearly entirely dependent in its operations upon sales and transportation in interstate commerce; that the industry had been marked for years by costly strikes; and that respondent had shown antagonism to union organization of its employees and discharged employees because of membership in labor organizations. The court held (the same justices dissenting) that the findings of the Board were supported by evidence and that the act was applicable to the labor relations of the company and its production employees.

On the same day, by the same division, it was held that the National Labor Relations Act could validly be applied to the editorial staff of the Associated Press, a membership corporation whose business was the collection of news from members and other sources throughout the United States and abroad, selecting, editing, rewriting the collected news and distributing it to its members. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 81 L. ed. 953, 57 Sup. Ct. 650 (1937). The dispute arose over the discharge of an editorial employee. On complaint of the American Newspaper Guild, a labor organization, the Labor Relations Board found that the Associated Press was engaged in interstate commerce, that the activities of its editorial employees directly affected interstate commerce, that the employee had been discharged in violation of the Act, and on the basis of these findings ordered his reinstatement. The Supreme Court sustained the lower court's decree ordering compliance with the Board's order.

In *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 81 L. ed. 965, 57 Sup. Ct. 648 (1937)—the last of the cases decided on this day—the act was held to apply to a motor bus company engaged in interstate transportation which had discharged and refused to reinstate certain drivers and garage workmen because of their membership in a labor union. In this case there was no dissent since no contention was made that the company was other than an instrumentality of interstate commerce.

4. The National Labor Relations Act was not the first congressional legislation under the commerce clause which sought to insure better labor-management relations. The objective of the Railway Labor Act of 1926 was to prevent the interruption of interstate commerce by labor disputes and strikes on the railroads of the United States. The law provided for the voluntary submission of labor disputes to arbitration, and, in case of failure of adjustment and threatened interruption of essential transportation service, for a Board of Mediation and a temporary suspension of the right of either party to the dispute to change the existing status. Representatives for the purposes of the act were to be designated by the respective parties "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." This act was upheld, as applied to railway clerks who were not directly engaged in the processes of interstate commerce, in *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 Sup. Ct. 427 (1930), the court saying that "the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." The 1926 statute was amended and strengthened in 1934. The railroads were required in the event of a dispute to bargain collectively with the organization certified by the National Mediation Board as authorized to represent the employees. The validity of this enactment was unanimously sustained in *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789, 57 Sup. Ct. 592 (1937), as applied to a railroad engaged in interstate commerce and its "back shop" employees. The court said: "The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject

petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect."

5. In *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 82 L. ed. 954, 58 Sup. Ct. 656 (1938) the act was held validly applicable to the labor relations between the packing company and its employees, the company's plant being located in California where it packed fruits and vegetables, the bulk of which were grown in that state, but 37 per cent of its output being shipped to buyers in other states and foreign countries.

6. In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 83 L. ed. 126, 59 Sup. Ct. 206 (1938) in holding that the act could constitutionally be applied to the labor relations between the Consolidated Edison Company and its employees, the court emphasized the dependence of interstate and foreign commerce upon the continuity of the service supplied by the company, which numbered among its customers railroad, telegraph, telephone and radio companies. "It cannot be doubted that these activities, while conducted within the state, are matters of federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the federal protective power."

### UNITED STATES v. F. W. DARBY LUMBER CO.

Supreme Court of the United States, 1941.

312 U. S. 100, 85 L. ed. 609, 61 Sup. Ct. 451, 132 A. L. R. 1430.

MR. JUSTICE STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to wit, lumber, for 'interstate commerce.'"

Appellee demurred to an indictment found in the District Court for southern Georgia charging him with violation of § 15(a)(1)(2) and (5) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201, et seq. The District Court sustained the demurrer and quashed the indictment and the case comes here on direct appeal under § 238 of the Judicial Code as amended, 28 U. S. C. § 345 [F. C. A. 28 § 345], and § 682, 18 U. S. C. [F. C. A. 18 § 682], 34 Stat. 1246, which authorizes an appeal to this Court when the judgment sustaining the demurrer "is based upon invalidity, or construction of the statute upon which the indictment is founded."

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2(a) of the Act, and the reports of Congressional committees proposing the legislation, \* \* \* is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him.

Section 15 of the statute prohibits certain specified acts and § 16(a) punishes willful violation of it by a fine of not more than \$10,000 and punishes each conviction after the first by imprisonment of not more than six months or by the specified fine or both. Section 15(a)(1) makes unlawful the shipment in interstate commerce of any goods "in the production of which any employee was employed in violation of section 6 or section 7," which provide, among other things, that during the first year of operation of the act a minimum wage of 25 cents per hour shall be paid to employees "engaged in [interstate] commerce or in the production of goods for [interstate] commerce," § 6, and that the maximum hours of employment for employees "engaged in commerce or in the production of goods for commerce" without increased compensation for overtime, shall be forty-four hours a week. § 7.

Section 15(a)(2) makes it unlawful to violate the provisions of §§ 6 and 7 including the minimum wage and maximum hour requirements just mentioned for employees engaged in production of goods for commerce. Section 15(a)(5) makes it unlawful for an employer subject to the Act to violate § 11(c) which requires him to keep such records of the persons employed by him and of their wages and hours of employment as the administrator shall prescribe by regulation or order.

The indictment charges that appellee is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate

commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day or week by each of his employees as required by § 11(c) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellee unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce."

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the prescribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

The case comes here on assignments by the Government that the District Court erred insofar as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellee seeks to sustain the decision below on the grounds that the prohibition by Congress of those acts is unauthorized by the commerce clause and is prohibited by the Fifth Amendment. The appeal statute limits our jurisdiction on this appeal to a review of the determination of the District Court so far only as it is based on the validity or construction of the statute. \* \* \*

*The prohibition of shipment of the proscribed goods in interstate commerce.* Section 15(a) (1) prohibits, and the indictment charges,

shipment in interstate commerce of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the Commerce Clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power to "prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. \* \* \* It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case*, 188 U. S. 321; *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Hoke v. United States*, 227 U. S. 308; stolen articles, *Brooks v. United States*, 267 U. S. 432; kidnapped persons, *Gooch v. United States*, 297 U. S. 124, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination, *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, supra, but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the Constitution." *Gibbons v. Ogden*, supra, 9 Wheat. 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, supra. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or

welfare, even though the state has not sought to regulate their use.  
\* \* \*

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. \* \* \*

The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U. S. 27; *Sonzinsky v. United States*, 300 U. S. 506, 513, and cases cited. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." *Veazie Bank v. Fenno*, 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

*Hammer v. Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when

made and unsupported by any provision of the Constitution—has long since been abandoned. *Brooks v. United States*, supra; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, supra; *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419; *Mulford v. Smith*, 307 U. S. 38. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. *Reid v. Colorado*, 187 U. S. 137; *Lottery Case*, supra; *Hipolite Egg Co. v. United States*, supra; *Seven Cases v. United States*, 239 U. S. 510; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *United States v. Carolene Products Co.*, 304 U. S. 144. And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569.

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

*Validity of the wage and hour requirements.* Section 15(a) (2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee's employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15(a) (2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the Court below construed the phrase "produced for interstate commerce," it embraces at least the case where an employer engaged, as is appellee, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the

initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. Cf. *United States v. New York Central R. Co.*, 272 U. S. 457, 464.

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, S. Rept. No. 884, 75th Cong. 1st Sess., pp. 7 and 8; H. Rept. No. 2738, 75th Cong. 3d Sess., p. 17, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 421. Cf. *United States v. Fenger*, 250 U. S. 199.

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. \* \* \* In the absence of Congressional legislation on the subject state laws which are not regulations of commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. \* \* \*

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and em-

ployee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38, 40; *National Labor Relations Board v. Fairblatt*, 306 U. S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the *Sherman Act*. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the *Interstate Commerce Act*, and the *National Labor Relations Act*, or whether they come within the statutory definition of the prohibited act as in the *Federal Trade Commission Act*. And sometimes Congress itself has said that a particular activity affects the commerce as it did in the present act, the *Safety Appliance Act*, and the *Railway Labor Act*. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

\* \* \*

Congress, having by the present Act adopted the policy excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Ruppert, Inc. v. Caffey*, 251 U. S. 264; *Everard's Breweries v. Day*, 265 U. S. 545, 560; *Westfall v. United States*, 274 U. S. 256, 259. As to state power under the Fourteenth Amendment, compare *Otis v. Parker*, 187 U. S. 606, 609; *St. John v. New York*, 201 U. S. 633; *Purity Extract & Tonic Company v. Lynch*, 226 U. S. 192, 201, 202. A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U. S. 342; *Wisconsin Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563; *United States v. New York Central R. R. Co.*, supra, 272 U. S. 464; *Currin v. Wallace*, 306 U. S.

1; *Mulford v. Smith*, 307 U. S. 38. Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton v. United States*, 271 U. S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. *McDermott v. Wisconsin*, 228 U. S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Curran v. Wallace*, 306 U. S. 11, and see to the like effect *United States v. Rock Royal Co-operative*, 307 U. S. 568.

We think also that § 15(a) (2), now under consideration, is sustainable independently of § 15(a) (1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. \* \* \*

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. \* \* \*

The means adopted by § 15(a) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See *Curran v. Wallace*, 306 U. S. 1. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, had made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. \* \* \*

So far as *Carter v. Carter Coal Co.*, 298 U. S. 238, is inconsistent with this conclusion, its doctrine is limited in principle by the decisions

under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. \* \* \*

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. \* \* \*

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. \* \* \* Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. \* \* \*

[The remaining portion of the opinion upholding the validity of the requirement of records of wages and hours, and finding the wage and hour provisions valid under the Fifth Amendment is here omitted.]

Reversed.

## NOTES

1. Note that the regulations imposed in the Fair Labor Standards Act apply to employees of industries "engaged in commerce or in the production of goods for commerce," whereas the National Labor Relations Act deals with unfair labor practices and conditions "affecting commerce," a phrase interpreted by the Supreme Court to be of broader import and to indicate that Congress has meant to exercise its plenary power under the commerce clause. Moreover, unlike such enactments as the Interstate Commerce Act and the National Labor Relations Act, the Fair Labor Standards Act has placed upon the federal courts—and ultimately the Supreme Court—the task of applying the general terms of the statute to diverse and complicated fact situations and of drawing lines which, because of the inherent difficulties involved, have been the subject of adverse criticism. While problems of this type are essentially statutory rather than constitutional, they involve the extension of federal authority over economic enterprises and relationships traditionally within the domain of the individual states and cannot be solved without some reference to the implications of the federal system of government.

In *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. ed. 1638, 62 Sup. Ct. 1116 (1942), holding that the statute included the engineer, firemen, elevator operators, watchmen, porters and a carpenter, all employed in the maintenance and operation of a building rented to various tenants practically all of whom manufactured or bought and sold ladies' garments for interstate commerce, the court noted that "the scope of the act is not coextensive with the limits of the power of Congress over commerce" and that "in this task of construction, we are

without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area."

In *Borden Co. v. Borella*, 325 U. S. 679, 89 L. ed. 1865, 65 Sup. Ct. 1223, 161 A. L. R. 1258 (1945) like employees engaged in maintenance of an office building were held to be within the act although no products were manufactured or processed in the building, the court viewing as controlling the fact that the employer company was the owner of the building and used 58% of the space in it for offices of the board of directors and its managerial staff, engaged in the direction and supervision of the entire business. The work of these officials was necessary to production, and to keep them going the work of the maintenance employees was necessary.

In *10 East 40th Street Bldg. v. Callus*, 325 U. S. 578, 89 L. ed. 1806, 65 Sup. Ct. 1227, 161 A. L. R. 1263 (1945), the court, with four dissents, held that the act was not applicable to the maintenance employees of a building which had 42% of the rentable area and 48% of the rented area occupied by the executive offices of manufacturing and mining concerns engaged in the production of goods for interstate commerce. The majority said that "an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer," and that "renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

In *Mabee v. White Plains Publishing Co.*, 327 U. S. 178, 90 L. ed. 607, 66 Sup. Ct. 511 (1946) it was held that the defendant employer was engaged in production of goods for commerce within the act on facts stated by the court as follows: "Respondent publishes a daily newspaper at White Plains, New York. During the period relevant here, its daily circulation ranged from 9,000 to 11,000 copies. It had no desire for and made no effort to secure out-of-state circulation. Practically all of its circulation was local. But about one-half of 1% was regularly out-of-state." Mr. Justice Murphy, dissenting, thought that Congress had not meant to include a business of that nature within the ambit of the statute.

2. The validity of the overtime pay provisions of the Fair Labor Standards Act was sustained in *Overnight Motor Transport Co. v. Missel*, 316 U. S. 572, 86 L. ed. 1682, 62 Sup. Ct. 1216 (1942), the court saying that financial pressure was applied by this provision to spread employment to avoid the extra wage, and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the statute.

### WICKARD v. FILBURN.

Supreme Court of the United States, 1942.  
317 U. S. 111, 87 L. ed. 122, 63 Sup. Ct. 82.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm.

He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment. \* \* \*

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940, before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The Act further provides that, whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a

referendum of farmers who will be subject to the quota, to determine whether they favor or oppose it; and, if more than one-third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation.

\* \* \*

Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed. \* \* \*

It is urged that, under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby*, 312 U. S. 100, sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power

because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*, 9 Wheat. 1, 194-195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. *Id.* at 197.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which require the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. Knight Co.*, 156 U. S. 1. These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*, *supra*.

Not long after the decision of *United States v. Knight Co.*, *supra*, Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398. It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation. In some cases sustaining the exercise of federal power over intrastate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material;" and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

In the *Shreveport Rate Cases*, 234 U. S. 342, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id.* at 351.

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. \* \* \* The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to

its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. \* \* \* It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119.

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which, in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion. \* \* \*

In the absence of regulation, the price of wheat in the United States would be much affected by world conditions. During 1941, producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about \$1.16 a bushel, as compared with the world market price of 40 cents a bushel.

Differences in farming conditions, however, make these benefits mean different things to different wheat growers. There are several large areas of specialization in wheat, and the concentration on this crop reaches 27 per cent of the crop land, and the average harvest runs as high as 155 acres. Except for some use of wheat as stock feed and for seed, the practice is to sell the crop for cash. Wheat from such areas constitutes the bulk of the interstate commerce therein.

On the other hand, in some New England states less than one per cent of the crop land is devoted to wheat, and the average harvest is less than five acres per farm. In 1940 the average percentage of the total wheat production that was sold in each state, as measured by value, ranged from 29 per cent thereof in Wisconsin to 90 per cent in Washington. Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding; and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. *Labor Board v. Fainblatt*, 306 U. S. 601, 606, et seq.; *United States v. Darby*, supra, at 123.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat over-

hangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

The statute is also challenged as a deprivation of property without due process of law contrary to the Fifth Amendment, both because of its regulatory effect on the appellee and because of its alleged retroactive effect. \* \* \*

[In the remainder of the opinion the Court held that the statute did not violate the Fifth Amendment, as applied to complainant, and reversed the District Court.]

Reversed.

#### NOTES

1. When Congress, during the closing years of the last century, began to use its commerce power in an effort to govern many phases of the national economy and resulting problems of constitutional interpretation were fraught with momentous practical consequences, the Supreme Court for upwards of half a century failed to follow a consistent course in determining the scope of the affirmative federal commerce power. Two lines of decision emerged, one giving a broad and the other a greatly contracted interpretation of the commerce clause and the extent of congressional authority under it. The cases selected for inclusion in this volume and those summarized and discussed in the notes are illustrative of these divergent approaches. The student will thus rightly conclude that during the period from 1890 to 1937, when the *Jones & Laughlin* case was decided by a still divided court, the constitutional law of the United States in respect to the scope of national power under the commerce clause was in a confused and formless state. Therefore, when first confronted with the politically explosive problem of the constitutionality of important New Deal legislation in the early thirties, the court had available in its judicial arsenal two conflicting sets of precedents. In choosing the solution which was restrictive of federal

power in the *Schechter and Carter Coal Company* cases it brought itself into headlong collision with the dominant political branches of the national government—a quarrel which culminated in the “court-packing” controversy of 1937. The extent to which the court ultimately accepted the broad interpretation of the affirmative commerce power of Congress is exemplified by the opinion in *Wickard v. Filburn*.

2. The commerce power of Congress includes the control of navigable waters of the United States, the regulation of their use for purposes of interstate and foreign commerce, and the power to forbid the erection of physical obstructions upon waterways used in interstate navigation. In 1899 Congress forbade the construction of any bridge, causeway, dam or dike on any navigable waterway without its consent, or, if the waterway was entirely within a single state, the consent of the Chief of Engineers and the Secretary of War. 33 U. S. C. § 401. Subsequently, the power to consent to the construction of dams was delegated to the Federal Power Commission. 16 U. S. C. § 797 (e).

*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 80 L. ed. 688, 56 Sup. Ct. 466 (1936) held that where the United States had erected a dam to improve navigation on a stream, the water power and electric energy generated at the dam were susceptible of disposition as property belonging to the United States wherever the government deemed most advantageous, the decision being rested on Art. IV, § 3, cl. 2 of the Constitution. The court in recent cases has greatly expanded its interpretation of what constitutes a “navigable stream,” holding that navigability is to be determined on the basis not only of the stream’s natural condition but also of its possible availability for navigation after the making of reasonable improvements. The result has been greatly to extend the jurisdiction of the federal government over water power projects. Flood protection, watershed development and recovery of cost of improvements through utilization of power are all parts of commerce control, and it is for Congress alone to decide whether a particular project by itself or as part of a more comprehensive scheme, will have such beneficial effect on interstate commerce as to justify its being undertaken. See *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. ed. 243, 61 Sup. Ct. 291 (1940); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 85 L. ed. 1487, 61 Sup. Ct. 1050 (1941); and *United States v. Commodore Park, Inc.*, 324 U. S. 386, 89 L. ed. 1017, 65 Sup. Ct. 803 (1945).

### Section 3.—State Power to Regulate Commerce.

#### COOLEY v. BOARD OF WARDENS OF PORT OF PHILADELPHIA.

Supreme Court of the United States, 1851.

12 How. 299, 13 L. ed. 996.

[Suit was begun in a Pennsylvania court to recover from Cooley, the consignee of two vessels, half pilotage fees, the two vessels having sailed from Philadelphia without a local pilot, in violation of a state statute which required vessels coming into or leaving the port to accept local pilots for pilotage through the Delaware River, and upon neglect to do so the master, owner or consignee was made liable to pay to the warden, as a penalty, half the pilotage fees, creating a fund for the relief of pilots and their dependents. The state supreme

court sustained a judgment against Cooley, who took this writ of error.]

MR. JUSTICE CURTIS delivered the opinion of the Court. \* \* \*

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

\* \* \*

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The Act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them. But the law on which these actions are founded, was not enacted till 1803. What effect then can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the states were divested of the power to legislate on this sub-

ject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress did per se deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded on the one side that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution ("Federalist," No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. 193; *Houston v. Moore*, 5 Wheat. 1; *Willson v. Blackbird Creek Co.*, 2 Pet. 251.

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to

the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive regulation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789, as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only

does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further. \* \* \*

Judgment affirmed.

[JUSTICES McLEAN and WAYNE dissented, and JUSTICE DANIEL concurred for other reasons.]

#### NOTES

1. Notes 1 and 2 following the opinion in *Gibbons v. Ogden* should be reexamined at this point. That case, it will be recalled, held that state action affecting commerce which is in conflict with congressional regulation is invalid, but it left undecided the question whether the commerce power of Congress was exclusive or concurrent. Did the commerce clause of its own force impliedly prohibit state regulation of interstate commerce or were the states free to regulate unless prevented by affirmative action of Congress? The rule of the *Cooley* case that the power of Congress is exclusive with respect to some matters and concurrent with respect to others was a compromise solution of conflicting viewpoints on this issue in the Supreme Court at the time of its formulation. It is easy to state but difficult to apply. It places upon the court, rather than Congress, the important task of determining whether or not a particular "subject" is "in its nature national" and "admits only of one uniform system, or plan of regulation." Whether the *Cooley* doctrine has supplied a satisfactory criterion for determining the negative implications of the commerce clause, i. e., the extent to which a state's exercise of its police power or its power of taxation is limited by the mere existence of the clause in the absence of any congressional regulation, has been the subject of much discussion. See Bikle, *The Silence of Congress*, 41 *Harv. L. Rev.* 200 (1927), 3 *Selected Essays on Constitutional Law* (1938),

911; Sholley, *The Negative Implications of the Commerce Clause*, 3 U. of Chi. L. Rev. 556 (1936), 3 *Selected Essays on Constitutional Law* (1938), 933; Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940); Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Col. L. Rev. 547 (1947); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 Vand. L. Rev. 446 (1951). A valuable short treatise is Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (1937).

2. In the absence of action by Congress, a state may authorize the construction of a bridge over a navigable stream, but Congress may at any time interpose and require the alteration or removal of such a bridge. Virginia having authorized the construction of a bridge across the Ohio River at Wheeling, the Supreme Court held that the bridge was an obstruction to navigation and in conflict with acts of Congress regulating the navigation of the river. Subsequently Congress enacted legislation declaring the bridge in question a lawful structure in its then position and elevation. The court pointed out that insofar as the bridge created an obstruction to navigation under previous acts of Congress, such congressional policy had been modified by the subsequent legislation and although the bridge might still be an obstruction in fact it was not so in contemplation of law. "The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L. ed. 435 (1856).

A bridge may be a link in turnpike or railway transportation and its relation to commerce by land may be more important than its relation to the navigation of the river which it spans. The degree to which one type of commerce is to be made subservient to the other may be determined by the states unless and until Congress intervenes. Thus, Philadelphia under authority of a Pennsylvania statute had the power to regulate the building of a bridge over the Schuylkill River in Philadelphia, in the absence of congressional legislation. *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (1866). So too, Illinois had the power to regulate the use of bridges over a navigable river in the City of Chicago, in the absence of legislation by Congress. *Escanaba & L. M. Transportation Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. 185 (1882). Previously noted federal legislation on the subject is discussed in Blair, *Federal Bridge Legislation and the Constitution*, 36 Yale L. J. 808 (1927).

### McDERMOTT v. WISCONSIN.

Supreme Court of the United States, 1913.

228 U. S. 115, 57 L. ed. 754, 33 Sup. Ct. 431, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39.

[McDermott and one Grady were severally convicted in a circuit court of Wisconsin for the violation of a statute of that state relating to the sale of corn syrup and other articles and for the protection of the public health. The statute made it unlawful to sell or offer for sale various syrups mixed with glucose unless the container in which the syrup was sold was labelled in a manner prescribed by the statute, and provided that such mixtures or syrups should have upon them no other designation or brand designating a saccharine substance than that prescribed by the statute. Each of the defendants, who were retail

merchants in Wisconsin, had ordered and received twelve half-gallon cans of corn syrup from wholesale grocers in Chicago, the shipments being made in wooden boxes containing the cans. Defendants removed the cans from the boxes and placed them on their shelves for sale, labelled as required by the federal Food and Drugs Act of 1906, but not labelled as required by the Wisconsin act. The convictions were affirmed by the Supreme Court of the State. 143 Wis. 18, 126 N. W. 888. Writ of error to that court.]

MR. JUSTICE DAY delivered the opinion of the Court.

\* \* \* It is insisted that the federal Food and Drugs Act passed under the authority of the Constitution has taken possession of this field of regulation and that the State act is a wrongful interference with the exclusive power of Congress over interstate commerce, in which, it appears, the goods in question were shipped. \* \* \*

That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution, it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. \* \* \*

The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs, and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. \* \* \*

That the word "package" or its equivalent expression, as used by Congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. \* \* \*

Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject matter of regulation. Limiting the requirements of the act as to adulteration and misbranded simply to the outside wrapping or box containing

the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the act, and, for the reasons we have stated, we think the requirements of the act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the act by the federal courts. \* \* \*

While these regulations are within the power of Congress, it by no means follows that the State is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this Court in *Savage v. Jones*, 225 U. S. 501, in which the power of the State to make regulations concerning the same subject-matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the State of Indiana were held not to be inconsistent with the Food and Drugs Act of Congress. While this is true, it is equally well settled that the State may not, under the guise of exercising its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior Federal power given to Congress by the Constitution. \* \* \*

Having in view the interpretation we have given the Food and Drugs Act, and applying the doctrine just stated \* \* \*, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce, the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. \* \* \*

While in this situation, the goods being unsold, as a condition of their legitimate sale within the State, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharine substance, as do the labels in these cases). In other words, it is essential to a legal exercise of possession

of and traffic in such goods under the state law that labels which presumably meet with the requirements of the federal law, and for the determination of the correctness of which Congress has provided efficient means, shall be removed from the packages before the first sale by the importer. In this connection it might be noted that, as a practical matter, at least, the first time the opportunity of inspection by the federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one State, and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the State the authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a State to discredit and burden legitimate federal regulations of interstate commerce, to destroy rights arising out of the federal statute which have accrued both to the government and the shipper, and to impair the effect of a federal law which has been enacted under the constitutional power of Congress over the subject.

To require the removal or destruction before the goods are sold of the evidence which Congress has, by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the federal law, is beyond the power of the State. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as it is said to have been laid down in the former decisions in this Court. \* \* \*

Congress, having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in section 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remaining "unloaded, unsold, or in original unbroken packages," and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided

not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of government inspection may only arise, when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of section 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act.

The doctrine of original packages had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 419. \* \* \* It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of the interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulent branded articles, and to choose appropriate means to that end. The legislative means provided in the federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the efficient exercise of such means.

For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the state court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the state must be reversed, and the cases are remanded to the state court for further proceedings not inconsistent with this opinion.

Judgment reversed.

#### NOTES

1. The "original package" doctrine, referred to in the opinion in the principal case, was announced in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (1927), where it was held that a state may not impose license fees on merchants selling goods imported in foreign commerce in the original package. In this case Chief Justice Marshall defined the meaning of the term "import" in the provision of the Constitution (Art. I, § 10, cl. 2) that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and laid down the rule that an article transported in foreign commerce ceased to be an import and became subject to state taxation only when the original package in which it was shipped was broken or when it was sold by the importer. Although the grounds

of the decision were peculiar to foreign commerce, the rule was subsequently applied to interstate commerce. The case is reprinted in the following section, where it will be considered more fully.

2. In fact situations of the type involved in the principal case, where the subject is one which a state may regulate in the absence of federal legislation, the problem is frequently to determine whether an act of Congress dealing with the same subject has so far "occupied the field" as to invalidate the state statute. This problem, while one of statutory construction rather than constitutional law, has been the bone of contention in much important litigation. Where there is a conflict, either specifically or by implication, between the act of Congress and the state law, the former governs. But not infrequently there is no actual conflict and the problem is one of determining the intent of Congress in enacting its legislation. The federal statute may, of course, have made it clear that Congress intended to occupy the field exclusively. Sometimes, however, the language of the statute is not free from doubt and the court's solution will depend on its own questionable interpretation of the available evidence as to the scope and purpose of the congressional regulation.

### SOUTHERN RAILWAY CO. v. RAILROAD COMMISSION OF INDIANA.

Supreme Court of the United States, 1915.  
236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. 304.

MR. JUSTICE LAMAR delivered the opinion of the Court.

The Indiana statute requires railway companies to place secure grab-irons and hand-holds on the sides or ends of every railroad car, under a penalty of \$100 fine to be recovered in a civil action.

In March, 1910, the Railroad Commission of the state brought such a suit against the Southern Railway Company, alleging that the company on February 24, 1910, had transported from Boonville, Indiana, to Milltown, Indiana, a car which did not have the required equipment. The defendant filed an answer in which it denied liability under the state law inasmuch as on February 24, 1910, the Federal Safety Appliance Act imposed penalties for failing to equip cars with hand-holds and also designated the court in which they might be recovered. The commission's demurrer to the answer was sustained. The defendant refusing to plead further, judgment was entered against the company. That judgment was affirmed by the state court and the case was brought here by writ of error.

The car alleged to have been without the required equipment, though transporting freight between points wholly within the State of Indiana, was moving on a railroad engaged in interstate commerce and the company was, therefore, subject to the provisions and penalties of the Safety Appliance Act. 27 Stat. 531, § 4. *Southern Railway v. United States*, 222 U. S. 20.

The defendant in error insists, however, that the railroad company was also liable for the penalty imposed by the Indiana statute. In support of this position numerous cases are cited which, like *Cross*

v. North Carolina, 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. This concurrent jurisdiction may be either because the nature of the act is such that at the same time it produces effects respectively within the sphere of state and federal regulation and thus violates the laws of both; or, where there is this double effect in a matter of which one can exercise control but an authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other. Compare, R. S., § 711; 37 Stat. 670.

But the principle that the offender may, for one act, be prosecuted in two jurisdictions has no application where one of the governments has exclusive jurisdiction of the subject-matter and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field the states could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and ipso facto, supersedes existing state legislation on the same subject. Congress of course could have "circumscribed its regulations" so as to occupy a limited field. *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Line v. Georgia*, 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.

\* \* \*

Without, therefore, discussing the many cases sustaining the right of the states to legislate on subjects which, while not burdening, may yet incidentally affect interstate commerce, it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument. Its application may be seen in rulings in the closely analogous cases relating to state penalties for failing to furnish cars and to state penalties for retaining employees

at work on cars beyond the time allowed by the Hours-of-Service Law.

\* \* \*

The test, however, is not whether the state legislation is in conflict with the details of the federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control. The Safety Appliance Act having superseded the Indiana statute the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

#### NOTES

1. The Federal Employers' Liability Act excludes the application of state workmen's compensation laws, the Supreme Court having interpreted the federal statute as intended to provide a complete regulation of the liability of an interstate railroad to such of its employees as are engaged in interstate commerce. *New York Central R. Co. v. Winfield*, 244 U. S. 147, 61 L. ed. 1045, 37 Sup. Ct. 546, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139 (1917).

2. In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. 524, L. R. A. 1918C, 451 Ann. Cas. 1917E, 900 (1917) the Supreme Court (Justices Holmes, Pitney, Brandeis and Clarke dissenting) held that the New York Workmen's Compensation Act did not apply to maritime workers injured in New York while unloading a vessel engaged in the coastwise traffic, since the constitutionally required uniformity in respect to maritime matters would be destroyed if the states could subject ships coming into their ports to the obligations of their compensation statutes. A subsequent statute of Congress making the workmen's compensation laws of any state applicable to injuries sustained in maritime work was invalidated on the ground that the grant of power to Congress to legislate with respect to maritime matters was exclusive and could not be delegated to the states. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 40 Sup. Ct. 438, 11 A. L. R. 1145 (1920), the same four justices dissenting. A further effort by Congress to permit state compensation laws to protect waterfront employees was likewise held invalid in *Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 68 L. ed. 646, 44 Sup. Ct. 302 (1924). Finally, in 1927, Congress enacted the Federal Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 901 *et seq.*), thus seeking by direct legislation an objective which the court had held could not be effected through delegation to the states. Here again, though, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." The difficulties involved in determining whether certain employees are covered by the federal or state laws are discussed in *Davis v. Department of Labor & Industries*, 317 U. S. 249, 87 L. ed. 246, 63 Sup. Ct. 225 (1942), the court saying that there is "clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

## KELLY v. WASHINGTON EX REL. FOSS CO.

Supreme Court of the United States, 1937.  
302 U. S. 1, 82 L. ed. 3, 58 Sup. Ct. 87.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of c. 200 of the Washington Laws of 1907 (Rem. Rev. Stat., §§ 9843 *et seq.*) relating to the inspection and regulation of vessels. The Supreme Court of the state directed judgment for respondents, holding the statute invalid "if applied to the navigable waters over which the Federal Government has control." 186 Wash. 589, 596. We granted certiorari. 299 U. S. 539. After hearing, we ordered reargument and requested the Attorney General of the United States to present the views of the Government upon the question whether the state Act or the action of the officers of the State thereunder conflicts with the authority of the United States or with the action of its officers under the Acts of Congress. The case has been reargued accordingly and the views of the Government have been presented both orally and upon brief in support of the decision of the state court.

The material facts, as set forth in the opinion of the state court, are that respondents own and operate one hundred and thirty-nine motor-driven tugs of which one hundred and eleven are less than sixty-five feet in length. Some of these tugs are registered and the remainder are enrolled and licensed under federal laws. For the most part these tugs are employed in intrastate commerce, but some tow to and from British Columbia ports or across the Columbia River or from other ports in Washington to ports in Oregon. Practically all these tugs are capable of engaging in interstate or foreign commerce and will do so if and when opportunity offers. Some of the larger tugs have towed and will tow to California ports. The main business, however, of most of the tugs is confined to moving vessels engaged in interstate and foreign commerce and other work in and about the harbors where they are stationed. 186 Wash. p. 590.

Respondents' complaint challenged the validity of a large number of requirements of the state Act which it was alleged the state authorities sought to enforce (186 Wash. p. 591), but these authorities by their answer and in the argument at bar disclaim an intention to enforce any of the state regulations which conflict with those established under the laws of the United States.

First. The first question is whether the state legislation as applied to respondents' motor-driven tugs is in all respects in conflict with express provisions of the federal laws and regulations. Wherever such conflict exists, the state legislation must fall, *Gibbons v. Ogden*, 9 Wheat. 1, 210.

Chapter 200 of the Washington Laws of 1907 is described by the state court as "a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States." Rem. Rev. Stat., § 9844; 186 Wash. p. 590. It cannot be doubted that the power of Congress over interstate and foreign commerce embraces the authority to make regulations for respondents' tugs. *Foster v. Davenport*, 22 How. 244; *Moran v. New Orleans*, 112 U. S. 69; *Harman v. Chicago*, 147 U. S. 396. Has Congress exercised that authority and, if so, to what extent?

The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation. \* \* \* [The opinion here sets forth in detail the federal statutes, the principal ones being: (1) an act for inspection and regulation of motor vessels carrying freight and passengers for hire; (2) the Motor Boat Act of 1910, which classifies motor boats subject to the Act and regulates the carrying of lights, fog horns, whistles, bells, life preservers, and fire equipment; (3) a statute requiring the marking of vessels with their names and home ports; (4) statutes subjecting to inspection vessels which have on board inflammable or combustible liquid cargo in bulk, or explosives; (5) statutes establishing "load lines" for vessels of one hundred and fifty gross tons in coastwise trade.]

We find the conclusion inescapable that, apart from the particular requirements in other respects, there is no provision of the federal laws and regulations for the inspection of the hull and machinery of respondents' motor-driven tugs in order to insure safety or determine seaworthiness, where these tugs respectively do not carry freight or passengers for hire, or do not have on board any inflammable or combustible liquid cargo in bulk, or do not transport explosives or like dangerous cargo, or are not seagoing vessels of three hundred gross tons or over, or, with respect to requirements as to load lines, are under one hundred and fifty gross tons. It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations. The testimony in the record shows that those laws and regulations are administered in accordance with this view.

Second. The next question is whether the federal statutes are to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety and determine seaworthiness in the case of vessels which in this respect lie outside the federal requirements.

The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying

on navigable waters within the control of the federal government. 186 Wash. pp. 593, 596. \* \* \*

This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject. \* \* \*

Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." \* \* \*

The application of the principle is strongly fortified where the State exercises its power to protect the lives and the health of its people. But the principle is not limited to cases of that description. It extends to exertions of state power directed to more general purposes. Thus it was applied in sustaining the order of a state commission requiring interstate carriers to construct a union passenger station as against the contention that Congress had occupied the field—in view of the broad sweep of the Act conferring authority upon the Interstate Commission to deal with the operation of interstate railroads—as it was found that Congress had not authorized the Commission to meet the public need in the particular matter in question. *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 283 U. S. 380, 391.

In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the federal laws and regulations have left untouched. There is plainly no inconsistency with the federal provisions. It would hardly be as-

serted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective power as to vessels not propelled by steam. The fact that the federal regulations were numerous and elaborate does not extend them beyond the boundary they established. When Congress took up the regulation of vessels otherwise propelled it applied its requirements to vessels of a described tonnage which carried freight or passengers for hire. When Congress a few years later passed the Motor Boat Act, it did not attempt to deal with the subject comprehensively but laid down rules in a few particulars of a definitely restricted range. And when, in 1936, Congress again addressed itself to the subject, it did not purport to occupy the entire field but confined its regulation to seagoing vessels of three hundred gross tons and over. It would be difficult to find a series of statutes in which the intention of Congress to circumscribe its regulation and to occupy a field limited by definite description is more clearly manifested.

When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the state to exclude diseased persons, animals and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess. And we are unable to conclude that so far as concerns the inspection of the hull and machinery of these vessels of respondents in order to insure safety and seaworthiness, the federal laws and regulations, which as we have found are not expressly applicable, carry any implied prohibition of state action. \* \* \*

Third. The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399, 400. \* \* \*

We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with present federal laws. Is that a subject which necessarily and in all aspects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action pro-

viding the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises. \* \* \*

\* \* \* Our conclusion is that the state Act has a permissible field of operation in relation to respondents' tugs and that the state court was in error in holding the Act completely unenforceable in deference to federal law. The judgment of the state court to that effect is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. Reversed.

#### NOTES

1. In *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U. S. 87, 70 L. ed. 482, 46 Sup. Ct. 279 (1926) it was held that an act of Congress directing the Secretary of Agriculture to establish quarantines to prevent interstate spread of plant diseases was intended to exclude the states from legislating in that field, and nullified existing state plant quarantine laws. Within six weeks of the decision Congress repudiated this judicial guess at its intention. (44 Stat. 250, 7 U. S. C. § 161.)

2. Whether a statute of New Hampshire making unlawful the operation on state highways of motor vehicles for hire by drivers who had been continuously on duty for more than twelve hours had been superseded by the Federal Motor Carrier Act of 1935 during the period prior to effective action by the Interstate Commerce Commission regulating hours of service of drivers of motor vehicles hauling in interstate commerce, was answered in the negative in *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79, 83 L. ed. 500, 59 Sup. Ct. 438 (1939). The court assumed that federal regulations governing hours of service, when formulated by the Commission, pursuant to the act, would supersede state statutes, but held that it was not the intent of Congress to displace local law before the new regulations became effective.

3. In *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 86 L. ed. 754, 62 Sup. Ct. 491 (1942) the court in a five-to-four decision held that federal regulation of the production of renovated butter by a statute taxing such butter and its manufacture, prescribing the conditions under which it is to be made, making provision for its inspection, and giving power to confiscate the finished product, excludes state power to inspect, seize, and detain packing stock butter from which renovated butter is made, from a manufacturer part of whose product is sold in interstate commerce. Chief Justice Stone and Justices Frankfurter, Murphy and Byrnes dissented. The court said: "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subject to the surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory while it was under federal observation and while federal enforcement deemed it wholesome would not only hamper the administration of the federal act but would be inconsistent with its requirements." The dissenters excoriated the result as a departure from the principle that Congress will not be deemed to have intended to strike down a state statute designed to protect the health and

safety of the public unless, in terms or in its practical administration, it conflicts with the act of Congress and palpably infringes its policy.

4. A California statute prohibits the sale of any transportation over the public highways of the state if the transporting carrier has failed to secure a permit from either the California Public Utilities Commission or the Interstate Commerce Commission. The federal Motor Carrier Act has substantially the same provision. The statutes differ in other particulars, and the state statute imposes a more severe penalty. The Supreme Court, in a five-to-four decision, took the view that coincidence of a state law with a federal regulation does not mean the automatic invalidity of the former but is only one factor to be considered in determining congressional intent. Here, since there is no conflict in terms and no possibility of conflict, the state law is valid. The dissenting justices (Frankfurter, Douglas, Jackson and Burton) thought that the California statute invades the exclusive jurisdiction which Congress is exercising through the Interstate Commerce Act and should be held to be superseded. *California v. Zook*, 336 U. S. 725, 93 L. ed. 1005, 69 Sup. Ct. 841 (1949).

5. A Wisconsin statute prohibiting strikes against public utilities and providing for compulsory arbitration of labor disputes after an impasse in collective bargaining has been reached, was held to be invalid as in conflict with the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947. Justices Frankfurter, Burton and Minton dissented. *Amalgamated Association of Street, Electric and Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 95 L. ed. 364, 71 Sup. Ct. 359 (1951).

6. A state court has no power to enjoin a labor union from picketing an interstate trucking company for the purpose of coercing the company into influencing its employees to join a labor union, although no labor dispute is in progress, since the employer's grievance falls within the exclusive jurisdiction of the National Labor Relations Board to prevent unfair labor practices and, consequently, state remedies are excluded. *Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346 U. S. 485, 98 L. ed. 228, 74 Sup. Ct. 161 (1953).

7. Problems relating to "occupation of the field" are not peculiar to the commerce power. They may arise in connection with other powers of Congress, any valid exercise of the national prerogative reducing the area within which state regulation may operate, and in some instances excluding state action altogether. See *e. g.* *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 581, 61 Sup. Ct. 399 (1941), holding that congressional legislation for the registration of aliens rendered a nonconflicting state alien registration law inoperative, Justice Stone dissenting with the concurrence of Chief Justice Hughes and Justice McReynolds. Not only does the question of supersession of state legislation by congressional legislation present difficulties of judgment, but in some instances the court has been divided on the issue as to whether challenged state action is in "irreconcilable conflict" with an act of Congress. A case in point is *Hill v. Florida ex rel. Watson*, 325 U. S. 538, 89 L. ed. 1782, 65 Sup. Ct. 1373 (1945). See Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946, 60 Harv. L. Rev. 262 (1946).

### PLUMLEY v. MASSACHUSETTS.

Supreme Court of the United States, 1894.  
155 U. S. 461, 39 L. ed. 223, 15 Sup. Ct. 154.

[Plumley was convicted for selling in Massachusetts, in violation of the state statute stated in the opinion, ten pounds of oleomargarine colored in imitation of yellow butter, in the unbroken original package

sent to him from Illinois by his principal. From the denial by the state supreme court of his habeas corpus petition this writ of error was taken.]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that "causes it to look like butter," the right to sell it "in a separate and distinct form, and in such manner as will advise the consumer of its real character," is neither restricted nor prohibited. It appears in this case that oleomargarine, in its natural condition, is of "a light yellowish color," and that the article sold by the accused was artificially colored "in imitation of yellow butter." Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk, or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that state, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. \* \* \* Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. \* \* \*

But the case most relied on by the petitioner to support the proposition that oleomargarine, being a recognized article of commerce, may be introduced into a state, and there sold in original packages, without any restriction being imposed by the state upon such sale, is *Leisy v. Hardin*, 135 U. S. 100. \* \* \*

It is sufficient to say of *Leisy v. Hardin* that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that state to the contrary notwithstanding, was beer manufactured in Illinois, and shipped to the former state, to be there sold in such packages. So

far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. The language we have quoted from *Leisy v. Hardin* must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import. \* \* \*

In view of the complex system of government which exists in this country \* \* \* the judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern. \* \* \*

Judgment affirmed.

[MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BREWER, dissented.]

#### NOTES

1. *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. 757 (1898) held invalid a state statute prohibiting the sale of oleomargarine transported in interstate commerce from another state and sold as oleomargarine and not as butter, Congress having previously recognized the product as a proper subject of commerce by imposing a tax thereon and regulating its manufacture, sale and exportation, the court saying that the police power of a state does not include the right to exclude a lawful article of commerce. *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. 768 (1898), decided at the same time, held invalid, as applied to original package sales, a state statute prohibiting the sale of oleomargarine as a substitute for butter unless it was colored pink. By subsequent acts of Congress similar to the Wilson Act relating to intoxicating liquor, oleomargarine shipped in interstate commerce was divested of its interstate character, leaving it subject to the power of the states over their internal commerce (21 U. S. C. § 25).

2. *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. 715 (1912) sustained an Indiana statute which provided for state inspection of prepared foods for domestic animals when offered for sale within the state and required labels to indicate ingredients, the purpose being to prevent fraud. *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 69 L. ed. 402, 45 Sup. Ct. 141 (1925) upheld a New York statute which penalized all sales of meat misbranded as kosher meat and misrepresentation of non-kosher meat as kosher, including sales in the original package of interstate shipment. *Armour & Co. v. North Dakota*, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. 440, Ann. Cas. 1916D, 548 (1916) held valid a state statute requiring lard to be sold at retail in packages of specified net weight, the label to state the true net weight, notwithstanding that wholesalers of other states were forced to conform to these requirements in order to retain their trade.

## SMITH v. ST. LOUIS &amp; S. W. R. CO.

Supreme Court of the United States, 1901.  
181 U. S. 248, 45 L. ed. 847, 21 Sup. Ct. 603.

[Error to the Court of Civil Appeals of Texas. The Texas Live-stock Sanitary Commission was authorized by law to establish quarantine and sanitary regulations for the protection of domestic stock. It was made their duty to investigate stock diseases alleged to exist and to adopt preventive measures. In June, 1897, the Commission recited that it had reason to believe that anthrax had broken out in Louisiana or was liable to do so, and recommended that until after November 15, 1897, no cattle, horses, or mules be transported thence into Texas. The Governor proclaimed this regulation. Plaintiff sued defendant railway for a consequent failure to deliver to him in Texas cattle shipped from Louisiana. The Court of Civil Appeals gave judgment for defendant.]

MR. JUSTICE MCKENNA delivered the opinion of the Court. \* \* \*

To what extent the police power of the state may be exerted on traffic and intercourse within the state, without conflicting with the commerce clause of the Constitution of the United States has not been precisely defined. \* \* \*

In *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, a statute of Missouri which provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever," was held to be in conflict with the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

The case was an action for damages against the railroad company for bringing cattle into the state in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle and to regulations not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid. \* \* \*

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, some prior cases were reviewed, and the Court, speaking by Mr. Justice Peckham, said:

"The general rule to be deduced from the decisions of this Court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In *Minnesota v. Barber*, 136 U. S. 313, it was held that an inspection law relating to an article of food was not a rightful exercise

of the police power of the state, if the inspection prescribed were of such a character, or if it were burdened with such conditions, as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer v. Rebman*, 138 U. S. 78, and in *Scott v. Donald*, 165 U. S. 58, 97."

The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; and their principle does not depend upon the number of states which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province,—exerted to regulate interstate commerce,—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine*. The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease. In *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers and inspection officers, and fees for them, to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the state for the protection of health, though some of its rules amounted to regulations of commerce with foreign nations and among the states. In *Kimmish v. Ball*, 129 U. S. 217, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should bring into the state any Texas cattle, unless they had been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; or should have in his possession any Texas cattle between the 1st day of November and the 1st day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, "and thereby spreading the disease among other cattle, known as the Texas fever," and there was, besides, criminal punishment. The Court did not pass upon the first section. In commenting upon the second some pertinent remarks were made on the facts which justified the statute, and the case of *Hannibal & St. J. R. Co. v. Husen*, *supra*, was explained. It was said that the case "interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject

to extraordinary liabilities.' Page 473. Such a statute, the Court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the Court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. Page 472. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, the *Husen Case* was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the state "any cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of this state shall be liable \* \* \* for \* \* \* damages," was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of Congress of May 29, 1884 (23 Stat. at L. 31, chap. 60), known as the Animal Industry Act.

What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. *Henderson v. New York*, 92 U. S. 259, and *Chy Lung v. Freeman*, 92 U. S. 275. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes,—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. \* \* \*

Judgment affirmed.

[MR. JUSTICE HARLAN and MR. JUSTICE BROWN wrote dissenting opinions, with the former of which MR. JUSTICE WHITE concurred.]

## NOTES

1. While the commerce clause does not prevent the states from subjecting interstate imports to reasonable inspection laws, legislation of this type which discriminates against the products and business of other states is held to burden interstate commerce and is invalid. *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed.

455, 10 Sup. Ct. 862 (1890); *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. 855 (1891); *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 11 Sup. Ct. 213 (1891).

2. A state may charge a reasonable inspection fee for services performed in making the inspection and most inspection statutes include such a provision. *D. E. Foote & Co. v. Stanley*, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. 377 (1914); *Standard Oil Co. v. Graves*, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. 320 (1919); *Pure Oil Co. v. Minnesota*, 248 U. S. 158, 63 L. ed. 180, 39 Sup. Ct. 35 (1918).

3. The imposition of state inspection fees on foreign imports and exports is governed by Art. I, § 10, cl. 2 of the Constitution, which provides: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." The opinion in *Patapasco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. 862 (1898), where an inspection statute which imposed a fee was upheld as against the contention that it was repugnant to the commerce clause and to the import-export clause, pointed out that such laws are not in themselves regulations of commerce and are usually aimed at determining the fitness of articles for domestic use, and, in so doing, protecting the public from fraud.

4. In *Mintz v. Baldwin*, 289 U. S. 346, 77 L. ed. 1245, 53 Sup. Ct. 611 (1933) the Supreme Court held valid a New York statute which forbade shipping into the state any cattle for dairy or breeding purposes unless accompanied by a certificate that the herd from which the cattle were drawn was free from Bang's disease, authenticated by the chief sanitary official of the state in which the herd was located. The court said that this was an inspection law aimed at preventing the spread of disease among dairy cattle and safeguarding the public health and therefore did not "so unnecessarily burden" interstate trade as to contravene the commerce clause; that federal animal quarantine laws did not purport to cover the entire field, and that the New York regulation did not conflict with any provision of the federal statutes.

### BALDWIN v. G. A. F. SEELIG, INC.

Supreme Court of the United States, 1935.

294 U. S. 511, 79 L. ed. 1032, 55 Sup. Ct. 497, 101 A. L. R. 55.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Whether and to what extent the New York Milk Control Act (N. Y. Laws of 1933, c. 158; Laws of 1934, c. 126) may be applied against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce is the question here to be determined.

G. A. F. Seelig, Inc. (appellee in No. 604 and appellant in No. 605) is engaged in business as a milk dealer in the City of New York. It buys its milk, including cream, in Fair Haven, Vermont, from the Seelig Creamery Corporation, which in turn buys from the producers on the neighboring farms. The milk is transported to New York by rail in forty-quart cans, the daily shipment amounting to about 200 cans of milk and 20 cans of cream. Upon arrival in New York

about 90% is sold to customers in the original cans, the buyers being chiefly hotels, restaurants and stores. About 10% is bottled in New York, and sold to customers in bottles. By concession title passes from the Seelig Creamery to G. A. F. Seelig, Inc., at Fair Haven, Vermont. For convenience the one company will be referred to as the Creamery and the other as Seelig.

The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid by dealers to producers. The validity of that system in its application to producers doing business in New York State has support in our decisions. *Nebbia v. New York*, 291 U. S. 502; *Hegeman Farms Corporation v. Baldwin*, 293 U. S. 163. *Cf.* *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194. From the farms of New York the inhabitants of the so-called Metropolitan Milk District, comprising the City of New York and certain neighboring communities, derive about 70% of the milk requisite for their use. To keep the system unimpaired by competition from afar, the Act has a provision whereby the protective prices are extended to that part of the supply (about 30%) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state. \* \* \*

Seelig buys its milk from the Creamery in Vermont at prices lower than the minimum payable to producers in New York. The Commissioner of Farms and Markets refuses to license the transaction of its business unless it signs an agreement to conform to the New York statute and regulations in the sale of the imported product. This the applicant declines to do. Because of that refusal other public officers, parties to these appeals, announce a purpose to prosecute for trading without a license and to recover heavy penalties. This suit has been brought to restrain the enforcement of the Act in its application to the complainant, repugnancy being charged between its provisions when so applied and limitations imposed by the Constitution of the United States. United States Constitution, Art. I, § 8, clause 3; Fourteenth Amendment, § 1. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), has granted a final decree restraining the enforcement of the Act in so far as sales are made by the complainant while the milk is in the cans or other original packages in which it was brought into New York, but refusing an injunction as to milk taken out of the cans for bottling, and thereafter sold in bottles. See opinion on application for interlocutory injunction:—7 F. Supp. 776; and *cf.* 293 U. S. 522. The case is here on cross-appeals. 28 U. S. C. § 380.

First. An injunction was properly granted restraining the enforcement of the Act in its application to sales in the original packages.

New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed. Accepting those postulates, New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed, by an express prohibition of the Constitution, beyond the power of a state, "except what may be absolutely necessary for executing its inspection laws." Constitution, Art. I, § 10, clause 2; *Woodruff v. Parham*, 8 Wall. 123. Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. "It is the established doctrine of this Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." *International Textbook Co. v. Pigg*, 217 U. S. 91, 112; and see *Brennan v. Titusville*, 153 U. S. 289; *Brown v. Houston*, 114 U. S. 622; *Webber v. Virginia*, 103 U. S. 344, 351; *Kansas City Southern R. Co. v. Kaw Valley Drainage District*, 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." *Farrand, Records of the Federal Convention*, vol. II, p. 308; vol. III, pp. 478, 547, 548; the *Federalist*, No. XLII; *Curtis, History of the Constitution*, vol. 1, p. 502; *Story on the Constitution*, § 259. If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to

be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia v. New York*, supra. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

We have dwelt up to this point upon the argument of the state that economic security for farmers in the milkshed may be a means of assuring to consumers a steady supply of a food of prime necessity. There is, however, another argument which seeks to establish a relation between the well-being of the producer and the quality of the product. We are told that farmers who are underpaid will be tempted to save the expense of sanitary precautions. This temptation will affect the farmers outside New York as well as those within it. For that reason the exclusion of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify impediments to commerce between the states. There is neither evidence nor presumption that the same minimum prices established by order of the Board for producers in New York are necessary also for producers in Vermont. But apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parity of prices between New York and other states. Appropriate certificates may be exacted from farmers in Vermont and elsewhere (*Mintz v. Baldwin*, 289 U. S. 346; *Reid v. Colorado*, 187 U. S. 137; milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary

requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. *Cf. Asbell v. Kansas*, 209 U. S. 251, 256; *Railroad Co. v. Husen*, 95 U. S. 465, 472. One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy. \* \* \*

Second. There was error in refusing an injunction to restrain the enforcement of the Act in its application to milk in bottles to be sold by the importer.

The test of the "original package," which came into our law with *Brown v. Marland*, 12 Wheat. 419, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. *Cf. Woodruff v. Parham*, *supra*; *Anglo-Chilean Nitrate Sales Corp v. Alabama*, 288 U. S. 218, 226. There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros. v. Cureton*, 262 U. S. 506; *Texas Co. v. Brown*, 258 U. S. 466, 475; *American Steel & Wire Co. v. Speed*, 192 U. S. 500. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents subdivided. "A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State." *Sonneborn Bros. v. Cureton*, *supra*, at p. 516. *Cf. McDermott v. Wisconsin*, 228 U. S. 115, 133; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 491; *Brimmer v. Rebman*, 138 U. S. 78; *Savage v. Jones*, *supra*, at p. 525; *W. U. Tel. Co. v. Foster*, 247 U. S. 105, 114; *Pacific Co. v. Johnson*, 285 U. S. 480, 493. In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. *Penn. Gas. Co. v. Public Service Commission*, 225 N. Y. 397, 403. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this over-mastering

requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.

The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices and other consequences of Vermont competition. To overcome that competition a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this Court as to the significance of the original package in interstate transactions were not meant to be a cover for retortion or suppression.

The distinction is clear between a statute so designed and statutes of the type considered in *Leisy v. Hardin*, 135 U. S. 100, to take one example out of many available. By the teaching of that decision intoxicating liquors are not subject to license or prohibition by the state of destination without congressional consent. They become subject, however, to such laws when the packages are broken. There is little, if any, analogy between restrictions of that type and those in controversy here. In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass. So also the analogy is remote between restrictions like the present ones upon the sale of imported milk and restrictions affecting sales in unsanitary sweat-shops. It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other states,

and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed.

The decree in No. 604 is affirmed, and that in No. 605 reversed, and the cause remanded for proceedings in accordance with this opinion.

It is so ordered.

#### NOTES

1. In *Whitfield v. Ohio*, 297 U. S. 431, 80 L. ed. 778, 56 Sup. Ct. 532 (1936) the Supreme Court sustained an Ohio statute prohibiting sale on the open market of goods manufactured wholly or in part by convicts in other states. The court relied upon the Hawes-Cooper Act, enacted by Congress to assist the states in enforcing their local policies against the sale of such goods within their borders, but the opinion suggests that the same result would have been reached in the absence of such legislation. The court said: "Even without such action by Congress the unbroken-package doctrine, as applied to interstate commerce, has come to be regarded, generally at least, as more artificial than sound. Indeed, in its relation to that commerce, it was definitely rejected in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 508, 509, as affording no immunity from state taxation."

2. The diminished importance of the "original package" rule as a test for determining whether a state-imposed regulation obstructs or burdens interstate commerce is indicated by the comments of Mr. Justice Cardozo in the principal case. During its heyday the court often had difficulty in determining what an original package was. In *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. 132 (1900) the court, after a review of the decisions, said: "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary cure in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. \* \* \* In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the state with regard to the particular article." In this case the court said that to come within the protection of the rule the package must be of the type ordinarily used by honest dealers in bona fide transactions and that the doctrine has no application where the manufacturer puts up the package with the express intent of evading the police laws of another state. Thus paste-board boxes containing ten cigarettes each, transported by the express company from the manufacturer's warehouse in North Carolina in an open basket to the defendant's place of business in Tennessee, where the boxes were taken out of the basket and delivered to the defendant, were held not to be original packages but a "discreditable subterfuge" to evade a state law prohibiting the sale of cigarettes. See also, *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. 44 (1912); *Hebe Co. v. Shaw*, 248 U. S. 297, 63 L. ed. 255, 39 Sup. Ct. 125 (1919); *Price v. Illinois*, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. 892 (1915). For further discussion of the doctrine, see Trickett, *The Original Package Ineptitude*, 6 Col. L. Rev. 161 (1906), 3 *Selected Essays on Constitutional Law* (1938), 1002.

3. A state may not discourage the influx of paupers from other states by making it a criminal offense for persons, firms or corporations within their borders to bring or assist in bringing into the state indigent persons not residents of the state. A majority of the court thought that the statute imposed an

unconstitutional burden upon interstate commerce. Justices Black, Douglas, Murphy and Jackson preferred to rest the decision upon the privileges and immunities clause of the Fourteenth Amendment. *Edwards v. California*, 314 U. S. 160, 86 L. ed. 119, 62 Sup. Ct. 164 (1941).

### MILK CONTROL BOARD v. EISENBERG FARM PRODUCTS.

Supreme Court of the United States, 1939.  
306 U. S. 346, 83 L. ed. 752, 59 Sup. Ct. 528.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We are called upon to determine whether a local police regulation unconstitutionally regulates or burdens interstate commerce.

Pennsylvania, by an Act of April 30, 1935 has declared the milk industry in that Commonwealth to be a business affected with a public interest. The statute defines a milk dealer as any person "who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture within or without the Commonwealth." It creates a Milk Control Board with authority to investigate, supervise, and regulate the industry and imposes penalties for violations of the law or of the Board's orders issued pursuant to the law, and requires a dealer to obtain a license by application to the Board. Licenses may be refused, suspended, or revoked for specified causes. A requisite of obtaining a license is that the dealer shall file with the Board a bond conditioned for the prompt payment of all amounts due to producers for milk purchased by the licensee. The act empowers the Board to require the dealer to keep certain records and directs the Board, with the approval of the Governor, to "fix, by official order, the minimum prices to be paid by milk dealers to producers and others for milk." The Board may vary the price according to the production, use, form, grade or class of milk.

The petitioner, the Milk Control Board, filed its bill in a Common Pleas Court to restrain the appellee from continuing to do business without complying with the statute. The respondent by its answer sought to justify failure to comply on the ground that it was engaged in interstate commerce. After trial the court dismissed the bill. The Supreme Court of Pennsylvania affirmed the decree.

The respondent, a Pennsylvania corporation, leases and operates a milk receiving plant in Elizabethville, Pennsylvania, at which it buys milk from approximately one hundred and seventy-five farmers in the neighborhood, who bring their milk to the plant in their own cans. There the milk is weighed and tested by the respondent and emptied into large receiving tanks in which it is cooled preparatory to shipment. This requires retention of the milk for less than twenty-four hours; it is not processed, and no change occurs in its constituent elements. The milk is then drawn from the cooling tanks into tank trucks operated by a contract carrier and transported into New York City for sale there by

the respondent. The journey is continuous from Elizabethtown to New York City. All milk purchased by the respondent at Elizabethtown is shipped to and sold in New York. During the year 1934 approximately 4,500,000,000 pounds of milk were produced in Pennsylvania of which approximately 470,000,000 pounds were shipped out of the state.

The respondent contends that the act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the prices prescribed by the Board, unconstitutionally regulates and burdens interstate commerce. The State Supreme Court has held that the statute is a valid police regulation. The petitioner concedes that the purchase, shipment into another state, and sale there of the milk in which the respondent deals is interstate commerce. The question for decision is whether, in the absence of federal regulations, the enforcement of the statute is prohibited by Article I, § 8 of the Constitution. We hold that it is not.

When the people declared "The Congress shall have Power \* \* \* To regulate Commerce \* \* \* among the several States, \* \* \*" their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein. The grant of the power of regulation to the Congress necessarily implies the subordination of the states to that power. This Court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. \* \* \*

The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional

enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.

The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress.

None of the decisions on which the court below and the respondent rely rules the instant case. *DiSanto v. Pennsylvania*, 273 U. S. 34, involved a state law directed solely at foreign commerce; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, condemned a state statute affecting commerce, over ninety per cent. of which was interstate and essaying to regulate the price of commodities sold within the state payable and receivable in the state of destination; *Shafer v. Farmers Grain Co.*, 268 U. S. 189, also dealt with a state law intended to regulate commerce almost wholly interstate in character. In *Baldwin v. Seelig*, 294 U. S. 511, this Court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state.

The decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER are of opinion that the Supreme Court of Pennsylvania properly concluded that under former opinions of this Court the questioned regulations constituted a burden upon interstate commerce prohibited by the Federal Constitution.

#### NOTES

1. In *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315, 63 Sup. Ct. 307 (1943) a California statute setting up a scheme for regulating the marketing of agri-

cultural products by producers with a view to maintaining and stabilizing prices, under which restrictions were imposed upon sales of raisins within the state by producers to those who were processing and packing them, was attacked as violative of the commerce clause because it appeared that approximately 95% of the crop found its way into interstate and foreign commerce after processing and packing. No congressional legislation prohibited or regulated the transactions affected by the state program, and the Secretary of Agriculture had not instituted any program under the Agricultural Marketing Agreement Act of 1937 with respect to raisins. In sustaining the statute, Chief Justice Stone, speaking for a unanimous court, said that "upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and, which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." The court further pointed out that the federal statute was applicable to raisins only on the direction of the Secretary of Agriculture, who, instead of establishing a federal program, cooperated in promoting the state program and aided it by substantial federal loans, pursuant to congressional agricultural policy.

2. In *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525, 93 L. ed. 865, 69 Sup. Ct. 657 (1949) the court divided five-to-four as to whether, in order to avoid depletion of the supply available within the state and to avoid destructive competition in a market already adequately served, New York could refuse to permit a distributor of milk in Massachusetts to open an additional local receiving station from which milk could be taken from New York. The majority treated the case as one in which a state was favoring home consumers and competitors against those in other states, and thus condemned the New York regulation as discriminating against, as well as burdening, interstate commerce. Said Mr. Justice Jackson: "This court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled." Distinguishing *Parker v. Brown*, the opinion stated: "Another element in the *Parker* case which led the court to sustain the California regulation was that it was one which the policy of Congress was to aid and encourage, and the Secretary of Agriculture had approved the state program by loans." *Query*: Does this mean that, apart from the factor mentioned, the decision in the *Parker* case might have gone the other way? The language of Chief Justice Stone's opinion in that case does not so indicate. Four justices (Black, Frankfurter, Murphy and Rutledge) dissented in *Hood v. Du Mond*. The cases are discussed in Note, 37 Cal. L. Rev. 667 (1949).

### DEAN MILK CO. v. MADISON.

Supreme Court of the United States, 1951.  
340 U. S. 349, 95 L. ed. 329, 71 Sup. Ct. 295.

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal challenges the constitutional validity of two sections of an ordinance of the City of Madison, Wisconsin, regulating the sale of milk and milk products within the municipality's jurisdiction. One section in issue makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a distance of five miles from the central square of Madison. An-

other section, which prohibits the sale of milk, or the importation, receipt or storage of milk for sale, in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials, is attacked insofar as it expressly relieves municipal authorities from any duty to inspect farms located beyond twenty-five miles from the center of the city.

Appellant is an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin. It contended below as it does here that both the five-mile limit on pasteurization plants and the twenty-five-mile limit on sources of milk violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution. The Supreme Court of Wisconsin upheld the five-mile limit on pasteurization. As to the twenty-five-mile limitation the court ordered the complaint dismissed for want of a justiciable controversy. 257 Wis. 308, 43 N. W. (2d) 480. This appeal, contesting both rulings, invokes the jurisdiction of this Court under 28 U. S. C. § 1257 (2); [F. C. A. 28 § 1257(2)].

The City of Madison is the county seat of Dane County. Within the county are some 5,600 dairy farms with total raw milk production in excess of 600,000,000 pounds annually and more than ten times the requirements of Madison. Aside from the milk supplied to Madison, fluid milk produced in the county moves in large quantities to Chicago and more distant consuming areas, and the remainder is used in making cheese, butter and other products. At the time of trial the Madison milkshed was not of "Grade A" standing by the standards recommended by the United States Public Health Service, and no milk labeled "Grade A" was distributed in Madison.

The area defined by the ordinance with respect to milk sources encompasses practically all of Dane County and includes some 500 farms which supply milk for Madison. Within the five-mile area for pasteurization are plants of five processors, only three of which are engaged in the general wholesale and retail trade in Madison. Inspection of these farms and plants is scheduled once every thirty days and is performed by two municipal inspectors, one of whom is full-time. The courts below found that the ordinance in question promotes convenient, economical and efficient plant inspection.

Appellant purchases and gathers milk from approximately 950 farms in northern Illinois and southern Wisconsin, none being within twenty-five miles of Madison. Its pasteurization plants are located at Chemung and Huntley, Illinois, about 65 and 85 miles respectively from Madison. Appellant was denied a license to sell its products within Madison solely because its pasteurization plants were more than five miles away.

It is conceded that the milk which appellant seeks to sell in Madison is supplied from farms and processed in plants licensed and inspected by public health authorities of Chicago, and is labeled "Grade A" under the Chicago ordinance which adopts the rating standards recommended

by the United States Public Health Service. Both the Chicago and Madison ordinances, though not the sections of the latter here in issue, are largely patterned after the Model Milk Ordinance of the Public Health Service. However, Madison contends and we assume that in some particulars its ordinance is more rigorous than that of Chicago.

Upon these facts we find it necessary to determine only the issue raised under the Commerce Clause, for we agree with appellant that the ordinance imposes an undue burden on interstate commerce.

This is not an instance in which an enactment falls because of federal legislation which, as a proper exercise of paramount national power over commerce, excludes measures which might otherwise be within the police power of the states. See *Curran v. Wallace*, 306 U. S. 1, 12-13. There is no pertinent national regulation by the Congress, and statutes enacted for the District of Columbia indicate that Congress has recognized the appropriateness of local regulation of the sale of fluid milk. D. C. Code, 1940, §§ 33-301 *et seq.* It is not contended, however, that Congress has authorized the regulation before us.

Nor can there be objection to the avowed purpose of this enactment. We assume that difficulties in sanitary regulation of milk and milk products originating in remote areas may present a situation in which "upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities \* \* \*." *Parker v. Brown*, 317 U. S. 341, 362-363; see *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525, 531-532. We also assume that since Congress has not spoken to the contrary, the subject matter of the ordinance lies within the sphere of state regulation even though interstate commerce may be affected. *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346; see *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 524.

But this regulation, like the provision invalidated in *Baldwin v. G. A. F. Seelig*, *supra*, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. "The importer \* \* \* may keep his milk or drink it, but sell it he may not." *Id.*, 294 U. S. at page 521. In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. *Cf. Baldwin v. G. A. F. Seelig, Inc. supra*; *Minnesota v. Barber*, 136 U. S. 313, 328. A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate

against interstate goods. *Cf. H. P. Hood & Sons, Inc. v. Du Mond*, supra. Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them. *Cf. Union Brokerage Co. v. Jensen*, 322 U. S. 202, 211.

It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors. *Cf. Sprout v. City of South Bend*, 277 U. S. 163, 169; see *Miller v. Williams*, 12 F. Supp. 236, 242, 244. Moreover, appellee health commissioner of Madison testified that as proponent of the local milk ordinance he had submitted the provisions here in controversy and an alternative proposal based on § 11 of the Model Milk Ordinance recommended by the United States Public Health Service. The model provision imposes no geographical limitation on location of milk sources and processing plants but excludes from the municipality milk not produced and pasteurized conformably to standards as high as those enforced by the receiving city. In implementing such an ordinance, the importing city obtains milk ratings based on uniform standards and established by health authorities in the jurisdiction where production and processing occur. The receiving city may determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milkshed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot checks the local ratings. The Commissioner testified that Madison consumers "would be adequately safeguarded" under either proposal and that he had expressed no preference. The milk sanitarian of the Wisconsin State Board of Health testified that the State Health Department recommends the adoption of a provision based on the Model Ordinance. Both officials agreed that a local health officer would be justified in relying upon the evaluation by the Public Health Service of enforcement conditions in remote producing areas.

To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that "one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G. A. F. Seelig, Inc.*, supra, 294 U. S. at page 527.

For these reasons we conclude that the judgment below sustaining the five-mile provision as to pasteurization must be reversed.

The Supreme Court of Wisconsin thought it unnecessary to pass upon the validity of the twenty-five-mile limitation, apparently in part

for the reason that this issue was made academic by its decision upholding the five-mile section. In view of our conclusion as to the latter provision, a determination of appellant's contention as to the other section is now necessary. As to this issue, therefore, we vacate the judgment below and remand for further proceedings not inconsistent with the principles announced in this opinion. It is so ordered.

Judgment vacated and cause remanded.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON concur, dissenting. \* \* \*

(1) This ordinance does not exclude wholesome milk coming from Illinois or anywhere else. It does require that all milk sold in Madison must be pasteurized within five miles of the center of the city. But there was no finding in the state courts, nor evidence to justify a finding there or here, that appellant, Dean Milk Company, is unable to have its milk pasteurized within the defined geographical area. As a practical matter, so far as the record shows, Dean can easily comply with the ordinance whenever it wants to. Therefore, Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison.

(2) Characterization of § 7.21 as a "discriminatory burden" on interstate commerce is merely a statement of the Court's result, which I think incorrect. The section does prohibit the sale of milk in Madison by interstate and intrastate producers who prefer to pasteurize over five miles distant from the city. But both state courts below found that § 7.21 represents a good-faith attempt to safeguard public health by making adequate sanitation inspection possible. While we are not bound by these findings, I do not understand the Court to overturn them. Therefore, the fact that § 7.21, like all health regulations, imposes some burden on trade, does not mean that it "discriminates" against interstate commerce.

(3) This health regulation should not be invalidated merely because the Court believes that alternative milk-inspection methods might insure the cleanliness and healthfulness of Dean's Illinois milk. \* \* \*

From what this record shows, and from what it fails to show, I do not think that either of the alternatives suggested by the Court would assure the people of Madison as pure a supply of milk as they receive under their own ordinance. On this record I would uphold the Madison law. At the very least, however, I would not invalidate it without giving the parties a chance to present evidence and get findings on the ultimate issues the Court thinks crucial—namely, the relative merits of the Madison ordinance and the alternatives suggested by the Court today.

#### NOTE

1. How far may a state go in restricting the export of its natural resources? Is there any test which can be applied in determining the validity of such restrictions? Oil and gas are important and useful articles of commerce and the

Supreme Court has taken the view that the states may not prohibit their exportation. See *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. 658, 32 A. L. R. 300 (1923), invalidating a state statute which required natural gas producers to give a priority to consumers within the state in the event the domestic supply of gas was insufficient to meet all demands. But the court has reached a different conclusion in a group of cases which uphold the states' attempt to conserve certain other natural resources—not privately owned—for local use. Here the resources are said to be owned by the states in trust for the benefit of their own people. *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. 600 (1896) held that a state may prohibit the killing of wild game for shipment out of the state and may prohibit such shipment, although permitting killing for other purposes. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. 529, 14 Ann. Cas. 560 (1908) sustained a state statute forbidding the diversion of the waters of its lakes or streams for use by cities in another state. *Cf. Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 73 L. ed. 147, 49 Sup. Ct. 1 (1928), conceding that a state may unconditionally forbid shipment out of the state of shrimp taken from its waters, but holding invalid as a violation of the commerce clause a statute that permitted such shipment only if the heads and hulls had previously been separated from the shell. In *Johnson v. Haydel*, 278 U. S. 16, 73 L. ed. 155, 49 Sup. Ct. 6 (1928), the same conclusion was reached as to a similar statute relating to oysters. And in *Toomer v. Witsell*, 334 U. S. 385, 92 L. ed. 1460, 68 Sup. Ct. 1156 (1948), provisions of a South Carolina statute which required that owners of shrimp boats fishing off the coast dock at a state port and unload, pack and stamp their catch before shipping or transporting it to another state were held invalid as a burden upon interstate commerce. Here again the court pointed out that the state had not attempted to retain for the use of its own people the shrimp caught in the marginal sea. See *Hardman, The Right of a State to Restrain the Exportation of Its Natural Resources*, 26 W. Va. L. Q. 1, 224 (1919-1920), 3 *Selected Essays on Constitutional Law* (1938), 1023; *Howard, Gas and Electricity in Interstate Commerce*, 18 *Minn. L. Rev.* 611 (1934).

### HALL v. DE CUIR.

Supreme Court of the United States, 1877.

95 U. S. 485, 24 L. ed. 547.

Error to the Supreme Court of Louisiana.

Benson, the defendant below, was the master and owner of the "Governor Allen," a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. The defendant in error, plaintiff below, a person of color, took passage upon the boat, on her trip up the river from New Orleans, for Hermitage, a landing place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought this action in the eighth district court for the Parish of New Orleans, under [the state statute stated in the opinion] to recover damages for her mental and physical suffering on that account. Benson, by way of defense,

insisted, among other things, that the statute was inoperative and void as to him, in respect to the matter complained of, because, as to his business, it was an attempt to "regulate commerce among the states," and, therefore, in conflict with Art. 1, Sec. 8, Par. 3, of the Constitution of the United States. The district court of the parish held that the statute made it imperative upon Benson to admit Mrs. De Cuir to the privileges of the cabin for white persons, and that it was not a regulation of commerce among the states, and, therefore, not void. After trial, judgment was given against Benson for \$1,000; from which he appealed to the supreme court of the state, where the rulings of the district court were sustained. \* \* \* Benson having died, Hall, his administratrix, was substituted in this Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

For the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states. \* \* \*

But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate

the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin, during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton v. State of Missouri*, 91 U. S. 282: "Inaction [by Congress] \* \* \* is equivalent to a declaration that interstate commerce shall remain free and untrammelled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the

extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. \* \* \*

Reversed.

[Mr. JUSTICE CLIFFORD concurred with a separate opinion.]

#### NOTES

1. In *Morgan v. Virginia*, 328 U. S. 373, 90 L. ed. 1317, 66 Sup. Ct. 1050, 165 A. L. R. 574 (1946) a Virginia statute requiring segregation on interstate motor busses was held invalid on the ground that seating arrangements for the different races in interstate motor travel "require a single, uniform rule to promote and protect national travel." Cf. *South Covington & C. Street R. Co. v. Kentucky*, 252 U. S. 399, 64 L. ed. 631, 40 Sup. Ct. 378 (1920). The provision of the Interstate Commerce Act making it unlawful for a railroad in interstate commerce to subject any person to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" has been construed to forbid a railroad to deny facilities to a Negro passenger because those available have been set aside for white passengers. *Mitchell v. United States*, 313 U. S. 80, 85 L. ed. 1201, 61 Sup. Ct. 873 (1941); *Henderson v. United States*, 339 U. S. 816, 94 L. ed. 1302, 70 Sup. Ct. 843 (1950).

2. In *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 92 L. ed. 455, 68 Sup. Ct. 358 (1948) the court held that a Michigan Civil Rights statute forbidding a carrier to discriminate in its service to persons of different races could validly be applied to a corporation engaged in operating an amusement park on Bois Blanc Island, which lies just above the mouth of the Detroit River in Ontario. Appellants had been convicted for refusing passage to a Negro on one of their steamers used solely for the purpose of transporting passengers between Detroit and the island. In affirming the conviction, the court conceded that the company's operations were in foreign commerce but pointed out that the power of Congress under the commerce clause does not exclude all regulations by the states. It concluded that the transportation of appellant's patrons was a segment of foreign commerce having a special local interest in Michigan; both the island and the defendant's business were insulated in a commercial and social sense from the stream of foreign commerce. Mr. Justice Jackson, joined by Chief Justice Vinson, dissented on the ground that the matter was properly one for federal regulation and so was outside the sphere of state action.

#### WABASH, ST. LOUIS & PACIFIC R. CO. v. ILLINOIS.

Supreme Court of the United States, 1886.  
118 U. S. 557, 30 L. ed. 244, 7 Sup. Ct. 4.

[Error to the Supreme Court of Illinois which had affirmed a judgment of the trial court that the state recover a penalty from the railroad company for violation of a state statute which forbade any railroad to charge the same or more for the transportation of any passenger or freight for any distance within the state than it charged for carrying a passenger or freight of like class and quantity for a greater distance over the same line in the same direction. The specific offense alleged was that the company charged one shipper 25 cents a hundred for a car-load of goods from Gilman, Illinois, to New York City while

charging another shipper 15 cents a hundred for a car-load of like goods from Peoria, Illinois, to New York, the latter distance being 86 miles longer.]

MR. JUSTICE MILLER delivered the opinion of the Court. \* \* \*

The Supreme Court of Illinois in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois railroad company was the compensation for the entire transportation from the point of departure in the state of Illinois to the city of New York, holds that, while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the state, it is binding and effectual as to so much of the transportation as was within the limits of the state of Illinois (*People v. Wabash, St. L. & P. R. Co.*, 104 Ill. 476); and, undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money for so much of it as was performed within the state of Illinois violate the statute of the state on that subject.

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. \* \* \* [The Court here considered several previous decisions.]

These extracts show that the question of the right of the state to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the Court in those cases. And it must be admitted that, in a general way, the Court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states, in the absence of any legislation by Congress on the same subject.

By the slightest attention to the matter, it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a state for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depends upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the

territories of half a dozen states, through which they are carried without change of car or breaking bulk. \* \* \*

It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the Court or in the arguments of counsel. \* \* \* It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges. \* \* \*

We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this Court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier: "I am free to make a fair and reasonable contract for this carriage to the line of the state of Illinois, but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of 15 cents per hundred pounds, he is not permitted to do so, because the Illinois railroad company has already charged at the rate of 25 cents per hundred pounds for carriage to Gilman, in Illinois, which is 86 miles shorter than the distance to Peoria. So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of 15 cents per hundred pounds for a car-load, but is compelled to pay at the rate of 25 cents per hundred pounds, because the railroad company has received from a person

residing at Gilman 25 cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that state. The effect of it is that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of 23 miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York. The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the states, when applied to transportation which includes Illinois in a long line of carriage through several states, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the states, and of the railroads concerned, better fits it to establish just and equitable rules. \* \* \*

That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character; and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

Judgment reversed.

[MR. JUSTICE BRADLEY gave a dissenting opinion, in which concurred CHIEF JUSTICE WAITE, and MR. JUSTICE GRAY.]

#### NOTES

1. The year following the decision in the principal case Congress enacted the Interstate Commerce Act, regulating the interstate transportation of persons and property by rail and creating the Interstate Commerce Commission to administer its provisions. Railroads were required to publish schedules of rates, and were forbidden to charge unjust or unreasonable rates, or to charge more for a short distance than for a long distance on the same line, without the consent of the Commission. The Commission was authorized to investigate alleged violations of the act and issue cease-and-desist orders against such violations. The story of the circumstances leading to the enactment of this law and the difficulties encountered by the Commission during the early period of its administration is told in Swisher, *American Constitutional Development* (1943), 406 *et seq.*

2. Since interstate ferriage is deemed a local matter not requiring national uniformity of rate regulation, the Supreme Court has construed the commerce clause as permitting each of the states between which a ferry operates to fix the rates for trips commencing from its side of the river. *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*,

234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. 821 (1914). In this case the court said: "The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control." A city may not, however, condition the operation of a ferry from that city to the opposite shore of the river in Canada upon the securing of a license from the city and payment of a license fee, since one cannot be compelled to take out a local license for the privilege of carrying on interstate or foreign commerce. *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 58 L. ed. 1337, 34 Sup. Ct. 826, 52 L. R. A. (N. S.) 574 (1914). The same principle was applied to prevent Vidalia, Louisiana, from making its consent and license a condition precedent to the operation of a ferry across the Mississippi River to Natchez, Mississippi, on the other shore. *Vidalia v. McNeely*, 274 U. S. 676, 71 L. ed. 1292, 47 Sup. Ct. 758 (1927). See, on this subject, *Knicier, Interstate Ferries and the Commerce Clause*, 26 Mich. L. Rev. 631 (1928).

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND v.  
ATTLEBORO STEAM & ELECTRIC CO.

Supreme Court of the United States, 1927.  
273 U. S. 83, 71 L. ed. 549, 47 Sup. Ct. 294.

Certiorari to the Supreme Court of Rhode Island.

MR. JUSTICE SANFORD delivered the opinion of the Court. \* \* \*

The Narragansett Electric Lighting Company is a Rhode Island corporation engaged in manufacturing electric current at its generating plant in the city of Providence and selling such current generally for light, heat and power. The Attleboro Steam & Electric Company is a Massachusetts corporation engaged in supplying electric current for public and private use in the city of Attleboro and its vicinity in that state.

In 1917, these companies entered into a contract by which the Narragansett Company agreed to sell, and the Attleboro Company to buy, for a period of twenty years, all the electricity required by the Attleboro Company for its own use and for sale in the city of Attleboro and the adjacent territory, at a specified basic rate; the current to be delivered by the Narragansett Company at the state line between Rhode Island and Massachusetts and carried over connecting transmission lines to the station of the Attleboro Company in Massachusetts, where it was to be metered. The Narragansett Company filed with the Public Utilities Commission of Rhode Island a schedule setting out the rate and general terms of the contract and was authorized by the Commission to grant the Attleboro Company the special rate therein shown; and the two companies then entered upon the performance of the contract. Current was thereafter supplied in accordance with its terms; and the generating plant of the Attleboro Company was dismantled.

In 1924 the Narragansett Company—having previously made an unsuccessful attempt to obtain an increase of the special rate to the

Attleboro Company—filed with the Rhode Island Commission a new schedule, purporting to cancel the original schedule and establish an increased rate for electric current supplied, in specified minimum quantities, to electric lighting companies for their own use or sale to their customers and delivered either in Rhode Island or at the state line. The Attleboro Company was in fact the only customer of the Narragansett Company to which this new schedule would apply.

The commission thereupon instituted an investigation as to the contract rate and the proposed rate. After a hearing at which both companies were represented, the Commission found that, owing principally to the increased cost of generating electricity, the Narragansett Company in rendering service to the Attleboro Company was suffering an operating loss, without any return on the investment devoted to such service, while the rates to its other customers yielded a fair return; that the contract rate was unreasonable and a continuance of service to the Attleboro Company under it would be detrimental to the general public welfare and prevent the Narragansett Company from performing its full duty to its other customers; and that the proposed rate was reasonable and would yield a fair return, and no more, for the service to the Attleboro Company. And the Commission thereupon made an order putting into effect the rate contained in the new schedule.

From this order the Attleboro Company prosecuted an appeal to the Supreme Court of Rhode Island which—considering only one of the various objections urged—held, on the authority of *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, that the order of the Commission imposed a direct burden on interstate commerce and was invalid because of conflict with the commerce clause of the Constitution; and entered a decree reversing the order and directing that the rate investigation be dismissed, 46 R. I. 496.

It is conceded, rightly, that the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the state line. The transmission of electric current from one state to another, like that of gas, is interstate commerce, *Coal & Coke Co. v. Pub. Serv. Comm.*, 84 W. Va. 662, 669, and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination. *Peoples' Gas Co. v. Pub. Serv. Comm'n*, 270 U. S. 550, 554.

The petitioners contend, however, that the Rhode Island Commission cannot effectively exercise its power to regulate the rates for electricity furnished by the Narragansett Company to local consumers, without also regulating the rates for the other service which it furnishes; that if the Narragansett Company continues to furnish electricity to Attleboro Company at a loss this will tend to increase the burden on the local consumers and impair the ability of the Narragansett Company to give them good service at reasonable prices; and that, therefore, the order

of the Commission prescribing a reasonable rate for the interstate service to the Attleboro Company should be sustained as being essentially a local regulation, necessary to the protection of matters of local interest, and affecting interstate commerce only indirectly and incidentally. In support of this contention, they rely chiefly upon *Pennsylvania Gas Co. v. Pub. Serv. Comm.*, 252 U. S. 23; and the controlling question presented is whether the present case comes within the rule of the *Pennsylvania Gas Co.* case or that of the *Kansas Gas Co.* case upon which the Attleboro Company relies.

In the *Pennsylvania Gas Co.* case, the Company transmitted natural gas by a main pipe line from the source of supply in Pennsylvania to a point of distribution in a city of New York, which it there subdivided and sold at retail to local consumers supplied from the main by pipes laid through the streets of the city. In holding that the New York Public Service Commission might regulate the rate charged to these consumers, the court said that while a state may not "directly" regulate or burden interstate commerce, it may in some instances, until the subject matter is regulated by Congress, pass laws "indirectly" affecting such commerce, when needed to protect or regulate matters of local interest; that the thing which the New York Commission had undertaken to regulate, while part of an interstate transmission, was "local in its nature," pertaining to the furnishing of gas to local consumers, and the service rendered to them was "essentially local," being similar to that of a local plant furnishing gas to consumers in a city; and that such "local service" was not of the character which required general and uniform regulation of rates by congressional action, even if the local rates might "affect" the interstate business of the company.

In the *Kansas Gas Co.* case, the company, whose business was principally interstate, transported natural gas by continuous pipe lines from wells in Oklahoma and Kansas into Missouri, and there sold and delivered it to distributing companies, which then sold and delivered it to local consumers. In holding that the rate which the company charged for the gas sold to the distributing companies—those at which these companies sold to the local consumers not being involved—was not subject to regulation by the Public Utilities Commission of Missouri, the court said that, while in the absence of congressional action a state may generally enact laws of internal police, although they have an indirect effect upon interstate commerce, "the commerce clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce," and a state enactment imposing such a "*direct burden*" must fall, being a direct restraint of that which in the absence of federal regulation should be free, *Minnesota Rate Cases*, 230 U. S. 352, 396; that the sale and delivery to the distributing companies was "an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon

such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve;" that in the Pennsylvania Gas Co. case, the decision rested on the ground that the service to the consumers for which the regulated charge was made, was "essentially local," and the things done were after the business in its essentially national aspect had come to an end—the supplying of local consumers being "a local business," even though the gas be brought from another state, in which the local interest is paramount and the interference with interstate commerce, if any, indirect and of minor importance; but that in the sale of gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, "the paramount interest is not local but national, admitting of and requiring uniformity of regulation," which, "even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned."

It is clear that the present case is controlled by the Kansas Gas Co. case. The order of the Rhode Island Commission is not, as in the Pennsylvania Gas Co. case, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the state is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose. *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 199; *Real Silk Mills v. Portland*, 268 U. S. 325, 336; *Di Santo v. Pennsylvania*, 273 U. S. 34. It is immaterial that the Narragansett Company is a Rhode Island corporation subject to regulation by the Commission in its local business, or that Rhode Island is the state from which the electric current is transmitted in interstate commerce, and not that in which it is received, as in the Kansas Gas Co. case. The forwarding state obviously has no more authority than the receiving state to place a direct burden upon interstate commerce. *Pennsylvania v. West Virginia*, 262 U. S. 553, 596. Nor is it material that the general business of the Narragansett Company appears to be chiefly local, while in the Kansas Gas Co. case the company was principally engaged in interstate business. The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the state because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in individual benefit to the

customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that state, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress. See *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 220; *Hanley v. Kansas City S. Ry. Co.*, 187 U. S. 617, 620.

The decree is accordingly

Affirmed.

[Dissenting opinion of MR. JUSTICE BRANDEIS omitted.]

SOUTH COVINGTON & CINCINNATI STREET R. CO. v.  
COVINGTON.

Supreme Court of the United States, 1915.

235 U. S. 537, 59 L. ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F, 792.

[The street railway company sued to enjoin enforcement by the City of Covington of the ordinance which is stated in the opinion. The state supreme court affirmed the trial court's dismissal of the petition, over the contention that the ordinance violated the commerce clause and the due process clause of the Fourteenth Amendment, and this writ of error was taken.]

MR. JUSTICE DAY delivered the opinion of the Court. \* \* \*

The testimony shows that the plaintiff is a Kentucky corporation, and its principal occupation is the carrying of passengers in connection with an Ohio corporation which operates on the other side of the Ohio River, upon continuous and connecting tracks, and across a bridge from Covington to Cincinnati, which this court has held to be an instrument of interstate commerce. *Covington &c. Bridge Co. v. Kentucky*, 154 U. S. 204. This traffic is conducted by means of continuous trips and for a single fare, between points on the lines of the railway in Covington and Fourth Street or Fountain Square in the City of Cincinnati, or from any point between Fourth Street or Fountain Square in the City of Cincinnati to points in the City of Covington. Practically every car is thus engaged in going to or coming from Cincinnati, and from seventy-five to eighty per cent. of the passengers carried in the City of Covington are being transported from Covington to Cincinnati, or from Cincinnati to Covington or farther in Kentucky. The cars operate without change of motormen or conductors, and under the direction of the same officers. \* \* \*

Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution? \* \* \*

In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in §§ 1 and 6 makes it unlawful for the company to permit more than one-third greater in number of the passengers to ride or be transported within its cars over and above a number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day, or Labor Day, and by § 6 it is made the duty of the company operating the cars within the city of Covington to run and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authorized to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges held by the company, or controlled by it, in that city. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the state. We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall v. De Cuir*, 95 U. S. 485, 489, "commerce cannot flourish in the midst of such embarrassments." \* \* \*

There are other parts of the ordinance which we are of opinion are within the authority of the state, and proper subject-matter for its regulation; at least, until the federal authority is exerted. These are

the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided, separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this Court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285; *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 291, 292. As to the regulation affecting the temperature of the cars, and providing that they shall never be permitted to be below 50° Fahrenheit, the undisputed testimony shows that it is impossible in the operation of the cars to keep them uniformly up to this temperature, owing to the opening and closing of doors, and other interferences that make it impracticable. We therefore think, upon this showing, this feature of the ordinance is unreasonable and cannot be sustained.

Our conclusion is that the Court of Appeals of Kentucky erred in refusing the injunction as against the provisions of the ordinance regulating the number of passengers to be carried in a car and the number of cars to be provided, and the requirement as to heating in view of the testimony as heretofore stated. In these respects its decision should be reversed. We think the other provisions of the ordinance separable and concerning them the plaintiff in error was not entitled to an injunction in the state court.

Reversed in part.

### SOUTHERN RAILWAY CO. v. KING.

Supreme Court of the United States, 1910.  
217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. 594.

[Two actions in a Circuit Court of the United States for injuries to persons crossing the railroad track. The railroad company's liability was alleged to arise from failure to observe the Georgia blow-post law stated in the opinion. Judgments for the plaintiffs were affirmed by the Circuit Court of Appeals and now on certiorari:]

MR. JUSTICE DAY delivered the opinion of the Court. \* \* \*

This statute is found in § 2222 of the Civil Code of Georgia, and reads as follows:

"There must be fixed on the line of said road, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive."

tive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road." \* \* \*

The rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state in the interest of the public health and safety, have been maintained by the decisions of this Court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the states. In *Smith v. Alabama*, 124 U. S. 465, it was held to be within the police power of the state to require locomotive engineers to be examined and licensed. In *N. Y., N. H. & H. Railroad Co. v. New York*, 165 U. S. 628, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained. In *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, it was held to be a valid enactment to require railway companies operating within the State of Ohio to cause three of its regular passenger trains to stop each way daily at every village containing over three thousand inhabitants. In *Erb v. Morasch*, 177 U. S. 584, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to six miles an hour, was a valid exertion of the police power of the state. In the case of *Crutcher v. Kentucky*, 141 U. S. 47, this Court said:

"It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of Congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

On the other hand, it has been held to be an illegal attempt to regulate interstate commerce to require interstate passenger trains to stop at county seats when adequate train service had already been provided for local traffic. *C. C. C. & St. L. R. R. Co. v. Illinois*, 177 U. S. 514. \* \* \*

Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the state to regulate, the manner in which interstate trains shall approach

dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact. \* \* \*

The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic \* \* \*. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. \* \* \* In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained. \* \* \*

Affirmed.

[Mr. JUSTICE HOLMES and Mr. JUSTICE WHITE dissented.]

#### SEABOARD AIR LINE R. CO. v. BLACKWELL.

Supreme Court of the United States, 1917.

244 U. S. 310, 61 L. ed. 1160, 37 Sup. Ct. 640, L. R. A. 1917F, 1184.

[The action was like those in the preceding case and involved the same statute. It was brought in a Georgia court. In answer the defendant alleged that the train was running in interstate commerce from Atlanta, Georgia, to other points in Georgia and South Carolina, that from Atlanta to the state line was 123 miles, that in that distance there were 124 crossings at which the statute required slowing down, that 3 minutes would be consumed in each slowing, or about 6 hours for all these slowings, increasing the train time from  $4\frac{1}{2}$  hours to  $10\frac{1}{2}$  hours between Atlanta and the state line. Upon demurrer to this answer, judgment went for the plaintiff. On appeal the state Supreme Court held the statute valid as applied to these facts. On writ of error.]

MR. JUSTICE MCKENNA delivered the opinion of the Court. \* \* \*

It will be observed, therefore, from this statement that the law of the state was an element in the decisions of the state tribunals and its

constitutionality was sustained against the attacks of the railway company. The question is, therefore, presented for our consideration. In its consideration we need not descant upon the extent of the police power of the state and the limitations upon it when it encounters the powers conferred upon the national government. There is pertinent exposition of these in *Southern Railway Co. v. King*, 217 U. S. 524, in which the law now under review was passed upon. The case is clear as to the relation of the powers and that the power of the state cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the state could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains, and, therefore, "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact." \* \* \*

The facts so specified and which it was decided would give illegal operation to the statute are alleged in the present case, and, assuming them to be true—and we must so assume—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly sustained. \* \* \*

Reversed and case remanded for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE [WHITE], MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS dissent on the ground that the regulation in question was within the class which the state is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.

#### SOUTHERN PACIFIC CO. v. ARIZONA EX REL. SULLIVAN.

Supreme Court of the United States, 1945.

325 U. S. 761, 89 L. ed. 1915, 65 Sup. Ct. 1515.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The Arizona Train Limit Law of May 16, 1912, Arizona Code Ann., 1939, § 69-119, makes it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger or seventy freight cars, and authorizes the state to recover a money penalty for each violation of the Act. The questions for decision are whether Congress has, by legislative enactment, restricted the power of the states to regulate the length of interstate trains as a safety

measure and, if not, whether the statute contravenes the commerce clause of the federal Constitution.

In 1940 the State of Arizona brought suit in the Arizona Superior Court against appellant, the Southern Pacific Company, to recover the statutory penalties for operating within the state two interstate trains, one a passenger train of more than fourteen cars, and one a freight train of more than seventy cars. Appellant answered, admitting the train operations, but defended on the ground that the statute offends against the commerce clause and the due process clause of the Fourteenth Amendment and conflicts with federal legislation. After an extended trial, without a jury, the court made detailed findings of fact on the basis of which it gave judgment for the railroad company. The Supreme Court of Arizona reversed and directed judgment for the state. 61 Ariz. 66, 145 Pac. 2d 530. The case comes here on appeal under § 237(a) of the Judicial Code, appellant raising by its assignments of error the questions presented here for decision.

The Supreme Court left undisturbed the findings of the trial court and made no new findings. It held that the power of the state to regulate the length of interstate trains had not been restricted by Congressional action. It sustained the Act as a safety measure to reduce the number of accidents attributed to the operation of trains of more than the statutory maximum length, enacted by the state legislature in the exercise of its "police power". This power the court held extended to the regulation of the operations of interstate commerce in the interests of local health, safety and well-being. It thought that a state statute, enacted in the exercise of the police power, and bearing some reasonable relation to the health, safety and well-being of the people of the state, of which the state legislature is the judge, was not to be judicially overturned, notwithstanding its admittedly adverse effect on the operation of interstate trains.

Purporting to act under § 1, paragraphs 10-17 of the Interstate Commerce Act, 24 Stat. 379 as amended (49 U. S. C. § 1 et seq.), the Interstate Commerce Commission, as of September 15, 1942, promulgated as an emergency measure Service Order No. 85, 7 Fed. Reg. 7258, suspending the operation of state train limit laws for the duration of the war, and denied an application to set aside the order. In the Matter of Service Order No. 85, 256 I. C. C. 523. \* \* \*

The Commission's order was not in effect in 1940 when the present suit was brought for violations of the state law in that year, and the Commission's order is inapplicable to the train operations here charged as violations. Hence the question here is not of the effect of the Commission's order, which we assume for purposes of decision to be valid, but whether the grant of power to the Commission operated to supersede the state act before the Commission's order. We are of the opinion that, in the absence of administrative implementation by the Commission, § 1 does not of itself curtail state power to regulate train lengths.

The provisions under which the Commission purported to act, phrased in broad and general language, do not in terms deal with that subject. We do not gain either from their words or from the legislative history any hint that Congress in enacting them intended, apart from Commission action, to supersede state laws regulating train lengths. We can hardly suppose that Congress, merely by conferring authority on the Commission to regulate car service in an "emergency," intended to restrict the exercise, otherwise lawful, of state power to regulate train lengths before the Commission finds an "emergency" to exist.

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, \* \* \* or unless the state law, in terms or in its practical administration, conflicts with the act of Congress, or plainly and palpably infringes its policy. \* \* \* Congress, although asked to do so, has declined to pass legislation specifically limiting trains to seventy cars. We are therefore brought to appellants principal contention, that the state statute contravenes the commerce clause of the Federal Constitution.

Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. \* \* \* When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. \* \* \*

But ever since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. *Cooley v. Board of Wardens*, supra, 319; *Leisy v. Hardin*, 135 U. S. 100, 108, 109; *Minnesota Rate Cases*, 230 U. S. 352, 399-400; *Edwards v. California*, 314 U. S. 160, 176. Whether or not this long recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, *Brown v. Maryland*, 12 Wheat. 419, 447; *Minnesota Rate Cases*, supra, 399, 400; *Pennsylvania v. West Virginia*, 262 U. S. 553, 596; *Baldwin v. Seelig*, 294 U. S. 511, 522; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185, or upon the presumed intention

of Congress, where Congress has not spoken, *Welton v. Missouri*, 91 U. S. 275, 282; *Hall v. De Cuir*, 95 U. S. 485, 490; *Brown v. Houston*, 114 U. S. 622, 631; *Bowman v. Chicago, etc. Ry.*, 125 U. S. 465, 481-2; *Leisy v. Hardin*, *supra*, 109; *In re Rahrer*, 140 U. S. 545, 559-60; *Brennan v. Titusville*, 153 U. S. 289, 302; *Covington & Co. Bridge Co. v. Kentucky*, 154 U. S. 204, 212; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 479, n., *Dowling, Interstate Commerce and State Power*, 27 Va. Law Rev. 1, the result is the same.

In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved. \* \* \*

For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter between the competing demands of state and national interests. \* \* \*

Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, *In re Rahrer*, *supra*, 561-62; *Adams Express Co. v. Kentucky*, 238 U. S. 190, 198; *Rosenberger v. Pacific Express Co.*, 241 U. S. 48, 50, 51; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 325-6; *Whitfield v. Ohio*, 297 U. S. 431, 438-40; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334, 350-51; *Hooven & Allison v. Evatt*, 324 U. S. 652, 679, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 230; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467; *Houston & Texas Ry. v. United States*, 234 U. S. 342; *American Express Co. v. Caldwell*, 244 U. S. 617, 626; *Ill. Cent. R. R. Co. v. Public Utilities Comm'n*, 245 U. S. 493, 506; *New York v. United States*, 257 U. S. 591, 601; *Commission v. Texas & N. O. R. Co.*, 284 U. S. 125, 130; *Penn. R. Co. v. Illinois Brick Co.*, 297 U. S. 447, 459.

But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn, \* \* \* and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will "afford a sure basis" for an informed judgment. \* \* \* Meanwhile, Congress

has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

While this Court is not bound by the findings of the state court, and may determine for itself the facts of a case upon which an asserted federal right depends, \* \* \* the facts found by the state trial court showing the nature of the interstate commerce involved, and the effect upon it of the train limit law, are not seriously questioned. Its findings with respect to the need for an effect of the statute as a safety measure, although challenged in some particulars which we do not regard as material to our decision, are likewise supported by evidence. Taken together the findings supply an adequate basis for decision of the constitutional issue.

The findings show that the operation of long trains, that is trains of more than fourteen passenger and more than seventy freight cars, is standard practice over the main lines of the railroads of the United States, and that, if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system. On many railroads passenger trains of more than fourteen cars and freight trains of more than seventy cars are operated, and on some systems freight trains are run ranging from one hundred and twenty-five to one hundred and sixty cars in length. Outside of Arizona, where the length of trains is not restricted, appellant runs a substantial proportion of long trains. In 1939 on its comparable route for through traffic through Utah and Nevada from 66 to 85% of its freight trains were over 70 cars in length and over 43% of its passenger trains included more than fourteen passenger cars.

In Arizona, approximately 93% of the freight traffic and 95% of the passenger traffic is interstate. Because of the Train Limit Law appellant is required to haul over 30% more trains in Arizona than would otherwise have been necessary. The record shows a definite relationship between operating costs and the length of trains, the increase in length resulting in a reduction of operating costs per car. The additional cost

of operation of trains complying with the Train Limit Law in Arizona amounts for the two railroads traversing that state to about \$1,000,000 a year. The reduction in train lengths also impedes efficient operation. More locomotives and more manpower are required; the necessary conversion and reconversion of train lengths at terminals and the delay caused by breaking up and remaking long trains upon entering and leaving the state in order to comply with the law, delays the traffic and diminishes its volume moved in a given time, especially when traffic is heavy. \* \* \*

The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding § 1, 54 Stat. 899. Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state. \* \* \*

At present the seventy freight car laws are enforced only in Arizona and Oklahoma, with a fourteen car passenger car limit in Arizona. The record here shows that the enforcement of the Arizona statute results in freight trains being broken up and reformed at the California border and in New Mexico, some distance from the Arizona line. Frequently it is not feasible to operate a newly assembled train from the New Mexico yard nearest to Arizona, with the result that the Arizona limitation governs the flow of traffic as far east as El Paso, Texas. For similar reasons the Arizona law often controls the length of passenger trains all the way from Los Angeles to El Paso.

If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.

The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for the present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.

The principal source of danger of accident from increased length of trains is the resulting increase of "slack action" of the train. Slack action is the amount of free movement of one car before it transmits its motion to an adjoining coupled car. This free movement results from the fact that in railroad practice cars are loosely coupled, and the coupling is often combined with a shock-absorbing device, a "draft gear," which, under stress, substantially increases the free movement as the train is started or stopped. Loose coupling is necessary to enable the train to proceed freely around curves and is an aid in starting heavy trains, since the application of the locomotive power to the train operates on each car in the train successively, and the power is thus utilized to start only one car at a time.

The slack action between cars due to loose couplings varies from seven-eighths of an inch to one and one-eighth inches and, with the added free movement due to the use of draft gears, may be as high as six or seven inches between cars. The length of the train increases the slack since the slack action of a train is the total of the free movement between its several cars. The amount of slack action has some effect on the severity of the shock of train movements, and on freight trains sometimes results in injuries to operatives, which most frequently occur to occupants of the caboose. The amount and severity of slack action, however, are not wholly dependent upon the length of train, as they may be affected by the mode and conditions of operation as to grades, speed, and load. And accidents due to slack action also occur in the operation of short trains. On comparison of the number of slack action accidents in Arizona with those in Nevada, where the length of trains is now unregulated, the trial court found that with substantially the same amount of traffic in each state the number of accidents was relatively

the same in long as in short train operations. While accidents from slack action do occur in the operation of passenger trains, it does not appear that they are more frequent or the resulting shocks more severe on long than on short passenger trains. Nor does it appear that slack action accidents occurring on passenger trains, whatever their length, are of sufficient severity to cause serious injury or damage.

As the trial court found, reduction of the length of trains also tends to increase the number of accidents because of the increase in the number of trains. The application of the Arizona law compelled appellant to operate 30.08%, or 4,304, more freight trains in 1938 than would otherwise have been necessary. And the record amply supports the trial court's conclusion that the frequency of accidents is closely related to the number of trains run. The number of accidents due to grade crossing collisions between trains and motor vehicles and pedestrians, and to collisions between trains, which are usually far more serious than those due to slack action, and accidents due to locomotive failures, in general vary with the number of trains. Increase in the number of trains results in more starts and stops, more "meets" and "passes", and more switching movements, all tending to increase the number of accidents not only to train operatives and other railroad employees, but to passengers and members of the public exposed to danger by train operations.

Railroad statistics introduced into the record tend to show that this is the result of the application of the Arizona Train Limit Law to appellant, both with respect to all railroad casualties within the state and those affecting only trainmen whom the train limit law is supposed to protect. The accident rate in Arizona is much higher than on comparable lines elsewhere, where there is no regulation of length of trains. The record lends support to the trial court's conclusion that the train length limitation increased rather than diminished the number of accidents. This is shown by comparison of appellant's operations in Arizona with those in Nevada, and by comparison of operations of appellant and of the Santa Fe Railroad in Arizona with those of the same roads in New Mexico, and by like comparison between appellant's operations in Arizona and operations throughout the country. \* \* \*

We think, as the trial court found, that the Arizona Train Limit Law, viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations and the consequent increase in train accidents of a character generally more severe than those due to slack action. Its undoubted effect on the commerce is the regulation, without securing uniformity, of the length of trains operating in interstate commerce, which lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency. In these respects the case differs from those where a state, by regulatory measures affecting the com-

merce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains. Such are measures abolishing the car stove, *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628; requiring locomotives to be supplied with electric headlights, *Atlantic Coast Line v. Georgia*, 234 U. S. 280; providing for full train crews, *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453; *St. Louis & Iron Mtn. Ry. v. Arkansas*, 240 U. S. 518; *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249; and for the equipment of freight trains with cabooses, *Terminal Railroad Ass'n v. Brotherhood*, 318 U. S. 1.

The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by "simply invoking the convenient apologetics of the police power," *Kansas Southern Ry. v. Kaw Valley District*, 233 U. S. 75, 79; *Buck v. Kuykendall*, 267 U. S. 307, 315. In the *Kaw Valley* case the Court held that the state was without constitutional power to order a railroad to remove a railroad bridge over which its interstate trains passed, as a means of preventing floods in the district and of improving its drainage, because it was "not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helped by raising them." \* \* \*

Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nation-wide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinate.

Appellees especially rely on the full train crew cases, \* \* \* and also on *South Carolina Highway Dept. v. Barnwell Bros.*, *supra*, as supporting the state's authority to regulate the length of interstate trains. While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here. In sustaining those laws the Court considered the restriction a minimal burden on the

commerce comparable to the law requiring the licensing of engineers as a safeguard against those of reckless and intemperate habits, sustained in *Smith v. Alabama*, 124 U. S. 465, or those afflicted with color blindness, upheld in *Nashville &c. Railway v. Alabama*, 128 U. S. 96, and other similar regulations. \* \* \*

*South Carolina Highway Dept. v. Barnwell Bros.*, supra, was concerned with the power of the state to regulate the weight and width of motor cars passing interstate over its highways, a legislative field over which the state has a far more extensive control than over interstate railroads. In that case, and in *Maurer v. Hamilton*, 309 U. S. 598, we were at pains to point out that there are few subjects of state regulation affecting interstate commerce which are so peculiarly of local concern as is the use of the state's highways. Unlike the railroads local highways are built, owned and maintained by the state or its municipal subdivisions. The state is responsible for their safe and economical administration. Regulations affecting the safety of their use must be applied alike to intrastate and interstate traffic. The fact that they affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses. Their regulation is akin to quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.

The contrast between the present regulation and the full train crew laws in point of their effects on the commerce, and the like contrast with the highway safety regulations, in point of the nature of the subject of regulation and the state's interest in it, illustrate and emphasize the considerations which enter into a determination of the relative weights of state and national interests where state regulation affecting interstate commerce is attempted. Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail. Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE BLACK, dissenting. \* \* \*

For more than a quarter of a century, railroads and their employees have engaged in controversies over the relative virtues and dangers of long trains. Railroads have argued that they could carry goods and passengers cheaper in long trains than in short trains. They have also argued that while the danger of personal injury to their employees might in some respects be greater on account of the operation of long trains, this danger was more than offset by an increased number of accidents from other causes brought about by the operation of a much larger number of short trains. These arguments have been, and are

now, vigorously denied. While there are others, the chief causes assigned for the belief that long trains unnecessarily jeopardize the lives and limbs of railroad employees relate to "slack action." Cars coupled together retain a certain free play of movement, ranging between 1½ inches and 1 foot, and this is called "slack action." Train brakes do not ordinarily apply or release simultaneously on all cars. This frequently results in a severe shock or jar to cars, particularly those in the rear of a train. It has always been the position of the employees that the dangers from "slack action" correspond to and are proportionate with the length of the train. The argument that "slack movements" are more dangerous in long trains than in short trains seems never to have been denied. The railroads have answered it by what is in effect a plea of confession and avoidance. They say that the added cost of running long trains places an unconstitutional burden on interstate commerce. Their second answer is that the operation of short trains requires the use of more separate train units; that a certain number of accidents resulting in injury are inherent in the operation of each unit, injuries which may be inflicted either on employees or on the public; consequently, they have asserted that it is not in the public interest to prohibit the operation of long trains. \* \* \*

This controversy between the railroads and their employees, which was nation-wide, was carried to Congress. Extensive hearings took place. The employees' position was urged by members of the various Brotherhoods. The railroads' viewpoint was presented through representatives of their National Association. In 1937, the Senate Interstate Commerce Commission after its own exhaustive hearings unanimously recommended that trains be limited to 70 cars as a safety measure. The Committee in its Report reviewed the evidence and specifically referred to the large and increasing number of injuries and deaths suffered by railroad employees; it concluded that the admitted danger from slack movement was greatly intensified by the operation of long trains; that short trains reduce this danger; that the added cost of short trains to the railroad was no justification for jeopardizing the safety of railroad employees; and that the legislation would provide a greater degree of safety for persons and property, increase protection for railway employees and the public, and improve transportation services for shippers and consumers. The Senate passed the bill but the House Committee failed to report it out.

During the hearings on that measure, frequent references were made to the Arizona statute. It is significant, however, that American railroads never once asked Congress to exercise its unquestioned power to enact uniform legislation on that subject, and thereby invalidate the Arizona law. That which for some unexplained reason they did not ask Congress to do when it had the very subject of train length limitations under consideration, they shortly thereafter asked an Arizona state court to do.

In the state court a rather extraordinary "trial" took place. Charged with violating the law, the railroad admitted the charge. It alleged that the law was unconstitutional, however, and sought a trial of facts on that issue. The essence of its charge of unconstitutionality rested on one of these two grounds: (1) the legislature and people of Arizona erred in 1912 in determining that the running of long cars was dangerous; or (2) railroad conditions had so improved since 1912 that previous dangers did not exist to the same extent, and that the statute should be stricken down either because it cast an undue burden on interstate commerce by reason of the added cost, or because the changed conditions had rendered the Act "arbitrary and unreasonable." Thus, the issue which the Court "tried" was not whether the railroad was guilty of violating the law, but whether the law was unconstitutional either because the legislature had been guilty of misjudging the facts concerning the degree of the danger of long trains, or because the 1912 conditions of danger no longer existed.

Before the state trial judge finally determined that the dangers found by the legislature in 1912 no longer existed, he heard evidence over a period of 5½ months which appears in about 3000 pages of the printed record before us. It then adopted findings of fact submitted to it by the railroad, which cover 148 printed pages, and conclusions of law which cover 5 pages. We can best understand the nature of this "trial" by analogizing the same procedure to a defendant charged with violating a state or national safety appliance act, where the defendant comes into court and admits violation of the act. In such cases, the ordinary procedure would be for the court to pass upon the constitutionality of the act, and either discharge or convict the defendants. The procedure here, however, would justify quite a different trial method. Under it, a defendant is permitted to offer voluminous evidence to show that a legislative body has erroneously resolved disputed facts in finding a danger great enough to justify the passage of the law. This new pattern of trial procedure makes it necessary for a judge to hear all the evidence offered as to why a legislature passed a law and to make findings of fact as to the validity of those reasons. If under today's ruling a court does make findings, as to a danger contrary to the findings of the legislature, and the evidence heard "lends support" to those findings, a court can then invalidate the law. In this respect, the Arizona County Court acted, and this Court today is acting, as a "super-legislature."

Even if this method of invalidating legislative acts is a correct one, I still think that the "findings" of the state court do not authorize today's decision. That court did not find that there is no unusual danger from slack movements in long trains. It did decide on disputed evidence that the long train "slack movement" dangers were more than offset by prospective dangers as a result of running a large number of short trains, since many people might be hurt at grade crossings. There was undoubtedly some evidence before the state court from which it could have

reached such a conclusion. There was undoubtedly as much evidence before it which would have justified a different conclusion.

Under those circumstances, the determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress, or the state, or the courts. A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government. \* \* \*

The Supreme Court of Arizona did not discuss the County Court's so-called findings of fact. It properly designated the Arizona statute as a safety measure, and finding that it bore a reasonable relation to its purpose declined to review the judgment of the legislature as to the necessity for the passage of the act. In so doing it was well fortified by a long line of decisions of this Court. Today's decision marks an abrupt departure from that line of cases. \* \* \*

MR. JUSTICE DOUGLAS, dissenting.

I have expressed my doubts whether the courts should intervene in situations like the present and strike down state legislation on the grounds that it burdens interstate commerce. *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 183-189. My view has been that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted. It seems to me particularly appropriate that that course be followed here. For Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. The Commission is the national agency which has been entrusted with the task of promoting a safe, adequate, efficient, and economical transportation service. It is the expert on this subject. It is in a position to police the field. And if its powers prove inadequate for the task, Congress, which has paramount authority in this field, can implement them. \* \* \* Whether the question arises under the Commerce Clause or the Fourteenth Amendment, I think the legislation is entitled to a presumption of validity. If a State passed a law prohibiting the hauling of more than one freight car at a time, we would have a situation comparable in effect to a state law requiring all railroads within its borders to operate on narrow gauge tracks. The question is one of degree and calls for a close appraisal of the facts. I am not persuaded that the evidence adduced by the railroads overcomes the presumption of validity to which this train-limit law is entitled. For the reasons stated by Mr. JUSTICE BLACK, Arizona's train-limit law should stand as an allowable regulation enacted to protect the lives and limbs of men who operate the trains.

## NOTES

1. Di Santo was convicted in a Pennsylvania court for selling steamship tickets or orders for transportation without a license required by a state statute, which forbade any person or corporation other than a railroad or steamship company to sell steamship tickets without first obtaining a license which was to be issued only upon the applicant's proving good moral character, fitness to conduct the business, and filing a \$1,000 bond to indemnify against his dishonesty, fraud or misrepresentation to purchasers. A majority of the Supreme Court held the statute invalid as a "direct" burden on foreign commerce. The opinion of Justice Butler said that the sales in question were related to foreign commerce as directly as were sales made in ticket offices maintained by the carriers and operated by their servants and employees. Justice Brandeis, in a dissenting opinion with which Justice Holmes concurred, said that this was not a case where the silence of Congress should be interpreted as a prohibition of state action. He viewed the statute, moreover, as one placing no direct burden on commerce but affecting it only indirectly. Justice Stone, in a separate dissent with which the other dissenters also agreed, criticized the test used by the court as to whether interference with interstate or foreign commerce was "direct" or "indirect." "In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." *Di Santo v. Pennsylvania*, 273 U. S. 34, 71 L. ed. 524, 47 Sup. Ct. 267 (1927).

2. In *California v. Thompson*, 313 U. S. 109, 85 L. ed. 1219, 61 Sup. Ct. 930 (1941) the Supreme Court, without dissent, adopted the views of the dissenting justices in the *Di Santo* case. A California statute required any "transportation agent" who "sells or offers for sale, or negotiates for" motor transportation over the public highways of the state to obtain a license from the State Railroad Commission, which was obtainable only upon satisfying the Commission of the applicant's fitness to exercise the licensed privilege, payment of a license fee of \$1.00, and filing a \$1,000 bond conditioned upon the faithful performance of the transportation contracts negotiated by him. Thompson's conviction of acting as a transportation agent without a license was reversed by a state appellate court on the authority of the *Di Santo* case. The Supreme Court reversed, holding that the state could validly apply the statute to agents who negotiate for interstate transportation. Justice Stone, for the court, after citing many of the cases he had cited in his *Di Santo* dissent, said: "The license required of those engaged in such business is not conditioned upon any control or restriction of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation brokers. Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of congressional action. Unless some measure of local control is permissible, it must go largely unregulated. \* \* \* After noting the fact that the *Di Santo* decision had taken a different view and citing several cases in which various state regulations of interstate transportation by motor vehicle on the state's highways had been upheld, the opinion concluded: "The decision in the *Di Santo* case was a departure from [the] principle which has been recognized since *Cooley v. Port Wardens*, 12 How. 299. It cannot be reconciled with later decisions of this court which have likewise recognized and applied the principle, and it can no longer be regarded as controlling authority."

3. The commerce clause has been held to prohibit a state from permitting its courts to assume jurisdiction of actions where to do so would place an undue burden upon interstate commerce. For a discussion and analysis of the cases see the opinion in *International Milling Co. v. Columbia Transportation Co.*, 292 U. S. 511, 78 L. ed. 1396, 54 Sup. Ct. 797 (1934). See also, *Farrier, Suits Against Foreign Corporations as a Burden on Interstate Commerce*, 17 Minn. L. Rev. 381 (1933), 3 Selected Essays on Constitutional Law (1938), 1052; *Comment, Jurisdiction Over Nonresident Carriers as Limited by Doctrine of Unreasonable Burden on Interstate Commerce*, 34 Mich. L. Rev. 979 (1936).

4. How far may a state go in placing restrictions on the right of a foreign corporation engaged in interstate commerce within the state to sue in its courts on contracts made in the course of carrying on such business? See *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. 57 (1914); *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 88 L. ed. 1227, 64 Sup. Ct. 967, 152 A. L. R. 1072 (1944).

### BUCK v. KUYKENDALL.

Supreme Court of the United States, 1925.

267 U. S. 307, 69 L. ed. 623, 45 Sup. Ct. 324, 38 A. L. R. 286.

MR. JUSTICE BRANDEIS delivered the opinion of the Court. \* \* \*

Section 4 of chapter III of the Laws of Washington, 1921, \* \* \* prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation. The highest court of the state has construed the section as applying to common carriers engaged exclusively in interstate commerce. *Northern Pacific Ry. Co. v. Schoenfeldt*, 123 Wash. 579; *Schmidt v. Department of Public Works*, 123 Wash. 705. The main question for decision is whether the statute so construed and applied is consistent with the federal constitution and the legislation of Congress.

Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Washington, and Portland, Oregon, as a common carrier for hire exclusively for through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws of Washington relating to motor vehicles, their owners and drivers (*Carlsen v. Cooney*, 123 Wash. 441), and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused. The ground of refusal was that, under the laws of the state, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate; and that, in addition to frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the State of Washington. *Re Buck*, P. U. R. 1923 E, 737. To enjoin interference by its

officials with the operation of the projected line, Buck brought this suit against Kuykendall, the Director of Public Works [in the United States District Court. His bill was dismissed.]

That part of the Pacific Highway which lies within the State of Washington was built by it with federal aid pursuant to the Act of July 11, 1916, c. 241, 39 Stat. 355, as amended February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act, November 9, 1921, c. 119, 42 Stat. 212. \* \* \* In support of the decree dismissing the bill this argument is made: \* \* \* The highways belong to the state. It may make provision appropriate for securing the safety and convenience of the public in the use of them. *Kane v. New Jersey*, 242 U. S. 160. \* \* \* With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Vandalia R. R. Co. v. Public Service Commission*, 242 U. S. 255; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat. § 3964; Act of March 1, 1884, c. 9, 23 Stat. 3, do that. \* \* \*

The argument is not sound. It may be assumed that § 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission v. Duke*, 266 U. S. 571. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. It also defeats the

purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways. \* \* \* Reversed.

[Mr. JUSTICE McREYNOLDS delivered a dissenting opinion.]

#### NOTES

1. The principal case was distinguished in *Fry Roofing Co. v. Wood*, 344 U. S. 157, 97 L. ed. 168, 73 Sup. Ct. 204 (1952), where it was held that interstate commerce is not unconstitutionally burdened by an Arkansas statute requiring a driver-owner of trucks, leased by a manufacturer to transport his product, to apply to the state Public Service Commission for a certificate of public convenience and necessity as a contract carrier, where there is nothing to show that the application will be denied to a carrier in interstate commerce or that burdensome conditions will be attached. Justice Douglas (with the concurrence of Chief Justice Vinson and Justices Burton and Minton) dissented on the ground that the statute is a regulation of interstate commerce, not a regulation of the use of Arkansas' highways, and is the kind of control which was denied to the State of Washington in *Buck v. Kuykendall*.

2. Congress recognized its obligation to regulate interstate transportation by motor carriers in the enactment of the Motor Carrier Act of 1935 (49 U. S. C. §§ 301-327), which delegates to the Interstate Commerce Commission the power to make such reasonable rules and regulations implementing the act as the Commission deems necessary or desirable in the public interest. The act seeks to insure collaboration between the Commission and state regulatory bodies.

#### KANE v. NEW JERSEY.

Supreme Court of the United States, 1916.

242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. 30.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

The New Jersey automobile law of 1906, as amended in 1908 (P. L. 1908, p. 613), provides in substance that no person, whether a resident or nonresident of the state, shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute; and also that a nonresident owner shall appoint the Secretary of State his attorney upon whom process may be served "in any action or legal proceeding caused by the operation of his registered motor vehicle, within this state, against such owner." The statute fixes the driver's license fee for cars of less than thirty horse power at two dollars and more than thirty horse power at four dollars. It fixes the registration fee at three dollars for cars of not more than ten horse power; five dollars for those from eleven to twenty-nine horse power; and ten dollars for those of thirty or greater horse power. Both license fees and registration fees, whensoever issued, expire at the close of the calendar year. The moneys received from license and registration fees in excess of the amount required for the maintenance of the Motor Vehicle Department are to be applied to the maintenance of the improved highways. Penalties are prescribed for using the public highways without complying with the requirements of the act. \* \* \*

Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey, and tried in the Recorder's Court. The following facts were stipulated: Kane had been duly licensed as a driver under the laws of both New York and New Jersey. He had registered his car in New York, but not in New Jersey. He had not filed with the secretary of state of New Jersey the prescribed instrument appointing that official his attorney upon whom process might be served. When arrested he was on his way from New York to Pennsylvania. The aggregate receipts from license and registration fees for the year exceeded the amount required to defray the expenses of the Motor Vehicle Department, so that a large sum became available for maintenance of the improved roads of the state. Kane contended that the statute was invalid as to him, a nonresident, because it violated the Constitution and laws of the United States regulating interstate commerce, and also because it violated the Fourteenth Amendment. These contentions were overruled, and he was fined \$5. The conviction was duly reviewed both in the supreme court and by the Court of Errors and Appeals. The contentions were repeated in both of those courts; and both courts affirmed the conviction. *Kane v. New Jersey*, 81 N. J. L. 594. The case was brought here by writ of error.

The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to ensure safety. And it is properly exercised in imposing a license fee graduated according to the horse power of the engine. *Hendrick v. Maryland*, 235 U. S. 610. Several reasons are urged why that case should not be deemed controlling:

1. The Maryland law did not require the nonresident to appoint an agent within the state upon whom process may be served. But it was recognized in discussing it, that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public." We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the state, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners.

2. The Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes

the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee. The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise. Our decision sustaining the Maryland law was not dependent upon the existence of the reciprocal provision. Indeed, the plaintiff in error there was not in a position to avail himself of the reciprocal clause. \* \* \*

3. In *Hendrick v. Maryland*, it appeared only that the nonresident drove his automobile *into* the state. In this case it is admitted that he was driving *through* the state. The distinction is of no significance. As we there said: "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."

4. In the *Hendrick* case it did not appear, as here, that the fees collected under the motor vehicle law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law "was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

The judgment should be

Affirmed.

#### BRADLEY v. PUBLIC UTILITIES COMMISSION.

Supreme Court of the United States, 1933.

289 U. S. 92, 77 L. ed. 1053, 53 Sup. Ct. 577, 85 A. L. R. 1131.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Bradley applied to the Public Utilities Commission of Ohio for a certificate of public convenience and necessity to operate by motor as a common carrier of property over State Route No. 20, extending from Cleveland, Ohio, to the Ohio-Michigan line, with Flint, Michigan, as

final destination. The New York Central Railroad and the Pennsylvania Railroad opposing, moved that the application be dismissed on the ground of the present congested condition of that highway. Upon a full hearing, the Commission found "that said State Route No. 20, at this time, is so badly congested by established motor vehicle operations, that the addition of the applicant's proposed service would create and maintain an excessive and undue hazard to the safety and security of the traveling public, and the property upon such highway." It therefore ordered: "That in the interest of preserving the public welfare, the application be, and hereby is, denied."

In a petition for a rehearing, which was also denied, Bradley urged, among other things, that denial of the application for the certificate on the ground stated violated rights guaranteed to the applicant by the commerce clause of the Federal Constitution and the equality clause of the Fourteenth Amendment. The same claims were asserted in a petition in error to the Supreme Court of the State; were there denied (125 Ohio State 381; 181 N. E. 668) upon the authority of *Motor Transport Co. v. Public Utilities Co.*, 125 Ohio State 374; 181 N. E. 665; and are renewed here upon this appeal. We are of opinion that the claims are unfounded.

First. It is contended that the order of the Commission is void because it excludes Bradley from interstate commerce. The order does not in terms exclude him from operating interstate. The denial of the certificate excludes him merely from Route 20. In specifying the route, Bradley complied with the statutory requirement that an applicant for a certificate shall set forth "the complete route" over which he desires to operate. Ohio General Code, § 614-90(c). But the statute confers upon an applicant the right to amend his application before or after hearing or action by the Commission. § 614-91. And it authorizes him, after the certificate is refused, to "file a new application or supplement any former application, for the purpose of changing" the route. § 614-93. No amendment of the application was made or new application filed. For aught that appears, some alternate or amended route was available on which there was no congestion. If no other feasible route existed and that fact was deemed relevant, the duty to prove it rested upon the applicant. It was not incumbent upon the Commission to offer a certificate over an alternate route.

Second. It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. The argument is that under the rule declared in *Buck v. Kuykendall*, 267 U. S. 307, and *Bush & Sons Co. v. Maloy*, 267 U. S. 317, an interstate carrier is entitled to a certificate as of right; and that hence the reason for the commission's refusal and its purpose are immaterial. In those cases, safety was doubtless promoted when the certificate was denied, because intensification of traffic was thereby prevented. See *Stephenson v. Binford*, 287 U. S. 251, 269-272.

But there, promotion of safety was merely an incident of the denial. Its purpose was to prevent competition deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident.

Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of the police power. It is primarily a state function, whether the locus be private property or the public highways. Congress has not dealt with the subject. Hence, even where the motor cars are used exclusively in interstate commerce, a State may freely exact registration of the vehicle and an operator's license, *Hendrick v. Maryland*, 235 U. S. 610, 622; *Clark v. Poor*, 274 U. S. 554, 557; *Sprout v. South Bend*, 277 U. S. 163, 169; may require the appointment of an agent upon whom process can be served in an action arising out of operation of the vehicle within the State, *Kane v. New Jersey*, 242 U. S. 160; *Hess v. Pawloski*, 274 U. S. 352, 356; and may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. *Continental Baking Co. v. Woodring*, 286 U. S. 352, 365-366. Compare *Packard v. Banton*, 264 U. S. 140; *Sprout v. South Bend*, 277 U. S. 163, 171-172; *Hodge Co. v. Cincinnati*, 284 U. S. 335, 337. The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety, *Morris v. Doby*, 274 U. S. 135, 144; *Sproles v. Binford*, 286 U. S. 374, 389-390. Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety. Compare *Hammond v. Schappi Bus Line*, 275 U. S. 164, 170-171. \* \* \*

Fourth. It is contended that the statute as applied to the plaintiff violates the equal protection clause of the Fourteenth Amendment. There is no suggestion that the plaintiff was treated less favorably than others who applied at the same time or thereafter for certificates as common carriers; nor is there any suggestion that the classification operates to favor intrastate over interstate carriers. One argument is that the statute discriminates unlawfully against common carriers in favor of shippers who operate their own trucks. In dealing with the problem of safety of the highways, as in other problems of motor transportation, the State may adopt measures which favor vehicles used solely in the business of their owners, as distinguished from those which are operated for hire by carriers who use the highways as their place of business. See *Packard v. Banton*, 264 U. S. 140, 144. Compare *Bekins Van Lines v. Riley*, 280 U. S. 80, 82; *Continental Baking Co. v. Woodring*, 286 U. S. 352, 373;

*Sproles v. Binford*, 286 U. S. 374, 396. Another objection is that to deny certificates to subsequent applicants discriminates unlawfully in favor of carriers previously certificated. But classification based on priority of authorized operation has a natural and obvious relation to the purpose of the regulation. Conceivably, restriction of the volume of traffic might be secured by limiting the extent of each certificate holder's use. But that would involve re-apportionment whenever a new applicant appeared. The guaranty of equal protection does not prevent the State from adopting the simple expedient of prohibiting operations by additional carriers. \* \* \* Affirmed.

## NOTES

1. In *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734, 58 Sup. Ct. 510 (1938) the court sustained a South Carolina statute which prohibited use on the state's highways of motor trucks and semi-trailer motor trucks exceeding ninety inches in width or of a weight including load in excess of 20,000 pounds. Mr. Justice Stone, for a unanimous court, said: "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse. \* \* \* Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." The court concluded that whether the weight and width restrictions adopted by South Carolina were wise or not they had some rational relation to safety of operation and to conservation of the highways.

2. The *Barnwell* case exemplifies the difference in judicial approach to problems involving the constitutionality of state regulation of motor carriers from that employed in passing upon the validity of state laws regulatory of other modes of transportation. In the field of highway regulation the court seeks not only to gauge the extent of the burden placed on interstate commerce but to weigh the importance of the state's interest that will be safeguarded by enforcement of the regulation. The court is loath to invalidate state motor vehicle regulation where the social justification for the legislative policy is brought clearly into view. No matter how comprehensive the scheme, how detailed and onerous the requirements or how varied the restrictions imposed upon the several

classes of carriers involved, the court is inclined to accept the legislative judgment in the absence of a clear showing of favoritism and arbitrary discrimination. The cases are collected and discussed in a recent annotation in 97 L. ed. 175 (1953). For annotations dealing with decisions under the Federal Motor Carrier Act of 1935, see 83 L. ed. 1168 (1939) and 86 L. ed. 597 (1942).

#### Section 4.—Limitations on State Taxation of Commerce.

##### BROWN v. MARYLAND.

Supreme Court of the United States, 1827.  
12 Wheat. 419, 6 L. ed. 678.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an Act of the Legislature of Maryland. The indictment was founded on the second section of that Act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offence; and that judgment is now before this Court.

The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported. \* \* \*

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." \* \* \*

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that

state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. \* \* \*

Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. \* \* \*

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences. \* \* \* While we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious that this construction would defeat the prohibition. \* \* \*

It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties. \* \* \*

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. \* \* \*

But if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution. \* \* \*

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the Constitution which declares that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"? \* \* \*

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. Rep. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce.

Congress has a right, not only to authorize importation, but to authorize the importer to sell. \* \* \*

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the Act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. \* \* \* If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given.  
\* \* \*

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles. \* \* \* Reversed.

[Mr. JUSTICE THOMPSON delivered a dissenting opinion.]

## NOTES

1. It is the purpose of the cases and notes in this section to supply material, on a purely selective basis, for discussion and analysis of some of the difficult

problems which have beset the Supreme Court in passing upon the constitutionality of state tax laws challenged under the commerce clause or other provisions of the Constitution in aid of the commerce power, particularly the so-called import-export clause (Art. I, § 10, cl. 2). Since the taxing power of the states is limited by the due process clause of the Fourteenth Amendment as well as by the provisions pertaining to commerce, the validity of a tax law as applied to a specific set of facts is frequently attacked on the ground that it is in excess of the state's jurisdiction to tax as well as burdensome to commerce. In the cases in this section, however, objections to the exercise of the states' taxing power based on the commerce provisions of the Constitution assume primary importance. The types of taxation considered in these cases are (1) taxes on imports and exports; (2) state and local property taxes; (3) license, privilege or franchise taxes; (4) excise taxes on use and sales of goods; and (5) gross receipts taxes.

The most recent treatise dealing exclusively with the subject-matter of this section is Hartman, *State Taxation of Interstate Commerce* (1953), which contains a careful analysis and discussion of Supreme Court decisions. Among the more recent law review articles discussing various problems presented in the cases are the following: Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?* 4 Vand. L. Rev. 496 (1951); Brown, *State Taxation of Interstate Commerce—What Now?* 48 Mich. L. Rev. 899 (1950); Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 Col. L. Rev. 211 (1947); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40 (1943); Lockhart, *State Tax Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253 (1940); Lockhart, *The Sales Tax in Interstate Commerce*, 52 Harv. L. Rev. 617 (1939); Morrison, *State Taxation of Interstate Commerce*, 36 Ill. L. Rev. 727 (1942); Overton, *State Taxation of Interstate Commerce*, 19 Tenn. L. Rev. 870 (1947); Powell, *New Light on Gross Receipts Taxes*, 53 Harv. L. Rev. 909 (1940); Powell, *More Ado About Gross Receipts Taxes*, 60 Harv. L. Rev. 501, 710 (1947); Powell, *Note, State Taxation of Imports*, 58 Harv. L. Rev. 858 (1945); Powell, *Note, Sales and Use Taxes: Collection from Absentee Vendors*, 57 Harv. L. Rev. 1086 (1944); Ratchford, *The Measure of Consumption Taxes*, 8 Law & Contemp. Prob. 561 (1941); Rockwell, *Justice Rutledge on State Taxation of Interstate Commerce*, 35 Corn. L. Q. 493 (1950); Traynor, *State Taxation and the Supreme Court*, 1938 Term, 28 Cal. L. Rev. 1 (1939); Wechsler, *Stone and the Constitution*, 46 Col. L. Rev. 764 (1946); Comment, *General Sales and Use Taxes and the Commerce Clause*, 32 Cal. L. Rev. 281 (1944).

2. The question whether commodities moving from one state to another were to be deemed imports upon arrival in the latter state and thus subject to the constitutional provision prohibiting the states from laying taxes on imports or exports (Art. I, § 10, cl. 2) was before the Supreme Court in *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382 (1869). Here a nondiscriminatory municipal tax on sales at auction of goods brought in from other states in original packages was sustained, the court holding that the term "import" relates only to shipments from foreign countries. As regards the commerce clause, it was held that so long as the articles are not discriminated against, no interference with interstate commerce is caused by their taxation, even in their original packages. The extent to which the "original package rule" has been applied to problems of state police regulation and interstate commerce has been dealt with in the preceding section.

3. A franchise tax imposed upon every foreign corporation doing business in the state and measured by the amount of capital employed by it in the state, cannot be constitutionally applied when the corporation's only property in the state is nitrate of soda imported from Chile into the state and there stored in the original packages for sale there and elsewhere in original packages. Anglo-

Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. ed. 710, 53 Sup. Ct. 373 (1933).

4. For a good discussion of the present scope of the "original package rule" as applied to foreign imports, see Chief Justice Stone's opinion for the court in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 89 L. ed. 1252, 65 Sup. Ct. 870 (1945) holding invalid as a tax on imports a nondiscriminatory ad valorem property tax on bales of hemp shipped into Ohio from the Philippines and stored in original packages in the manufacturer's warehouse pending their use in the manufacture of rope. The court said that merchandise brought into the country from a place without is still an import, even though it does not come from a foreign country.

### CREW LEVICK CO. v. PENNSYLVANIA.

Supreme Court of the United States, 1917.  
245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. 126.

Error to the Supreme Court of Pennsylvania.

MR. JUSTICE PITNEY delivered the opinion of the Court.

The State of Pennsylvania, by an Act of May 2, 1899, P. L., p. 184, imposes an annual mercantile license tax of three dollars upon each wholesale vender of or dealer in goods, wares, and merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail venders, and at still another upon venders at an exchange or board of trade. In the year 1913 plaintiff in error sold and delivered at wholesale, from a warehouse located in that state, merchandise to the value of about \$47,000 to purchasers within the state, and merchandise to the value of about \$430,000 to customers in foreign countries: the latter sales usually having been negotiated by agents abroad who took orders and transmitted them to plaintiff in error at its office in the State of Pennsylvania, subject to its approval, while in some cases orders were sent direct by the customers in foreign countries to plaintiff in error; and the goods thus ordered, upon the acceptance of the orders, having been shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries. Under the Act of 1899 a mercantile license tax was imposed upon plaintiff in error, based upon the amount of its gross annual receipts. Plaintiff in error protested against the assessment of so much of the tax as was based upon the gross receipts from merchandise shipped to foreign countries. The Court of Common Pleas of Philadelphia and, upon appeal, the Supreme Court of the state (256 Pa. St. 508) sustained the tax, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without the consent of Congress, contrary to §§ 8 and 10 of Art. I of the Constitution of the United States.

\* \* \*

The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of \$3 imposed upon wholesale venders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty upon exports. \* \* \* [Citations omitted.]

The tax now under consideration, so far as it is challenged, \* \* \* bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in case of the State Freight Tax, 15 Wall. 232, 277, "The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state." That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it. \* \* \* Reversed.

#### NOTES

1. The scope of the constitutional immunity of exports from both state and federal taxation is considered in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 91 L. ed. 80, 67 Sup. Ct. 156 (1946), holding invalid as a tax on exports a state sales tax imposed on the sale of oil to a foreign government. Here the foreign purchaser furnished the ship to carry the oil abroad, delivery being made into the hold of the vessel from the vendor's tanks located at the dock. The court said that "when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use."

2. In *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 91 L. ed. 993, 67 Sup. Ct. 815 (1947) the court held invalid under the commerce clause (Justices Black, Douglas, Murphy and Rutledge dissenting) an excise tax levied by the City of New York upon the gross receipts of stevedoring companies from loading and unloading vessels employed in interstate and foreign commerce. Justice Douglas, with the concurrence of Justice Rutledge, found no violation of the commerce clause but thought that the tax was repugnant to the import-export clause, since loading and unloading are a part of the "exporting process" which that clause protects from state taxation. But a state franchise tax on steam railroads measured by gross receipts apportioned to the length of lines within the state was held not to violate the import-export clause when imposed in respect of a railroad's receipts for services in handling imports and exports at its marine terminal, or to burden interstate commerce. *Canton R. Co. v. Rogan*, 340 U. S. 511, 95 L. ed. 488, 71 Sup. Ct. 447, 20 A. L. R. (2d) 145 (1951). For recent annotations on state taxation as affected by the import-export clause, see 89 L. ed. 1279 (1945); 91 L. ed. 97 (1947); and 95 L. ed. 496 (1951).

### BROWN v. HOUSTON.

Supreme Court of the United States, 1885.

114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. 1091.

[This was a suit to restrain a state tax-collector in Louisiana from seizing and selling several flat-boat loads of coal to pay taxes levied upon it for the year 1880. The coal belonged to the plaintiffs who were residents and did business in Pittsburgh, Pennsylvania. It had been mined in Pennsylvania and shipped to New Orleans where, at the time the taxes were assessed, it had just arrived in flat-boats and was lying in the Mississippi River "in its original condition and in its original packages," in the hands of plaintiffs' agents for sale. The taxes were claimed under a Louisiana statute which in terms "levied annual taxes, amounting in the aggregate to six mills on the dollar of the assessed valuation \* \* \* of all property situated within the State of Louisiana." The Supreme Court of Louisiana sustained the tax and this writ of error was taken.]

MR. JUSTICE BRADLEY delivered the opinion of the Court. \* \* \*

In short, it may be laid down as the settled doctrine of this court, at this day, that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations.

This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter state; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the states; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power

of the state until Congress shall see fit to interfere and make express regulations on the subject.

As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated. \* \* \*

We do not mean to say that if a tax-collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff v. Parham*, which had no relation to the movement of goods from one state to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner. \* \* \*

The judgment of the Supreme Court of Louisiana is affirmed.

#### CHAMPLAIN REALTY CO. v. BRATTLEBORO.

Supreme Court of the United States, 1922.

260 U. S. 366, 67 L. ed. 309, 43 Sup. Ct. 146, 25 A. L. R. 1195.

[Certiorari to the Supreme Court of Vermont. Plaintiff cut pulp wood at various places in Vermont and floated it down the West River, thence into the Connecticut River at the junction of these rivers in the town (township) of Brattleboro, Vermont, thence to

their mill at Hinsdale, New Hampshire, which was about three miles below Brattleboro, on the Connecticut River. They maintained a log boom at the mill to stop and hold the wood. This boom was not strong enough for these purposes when the waters of the Connecticut were high. At such times plaintiffs detained the wood in a pond, an enlargement of West River, in Brattleboro, near its junction with the Connecticut, holding the wood there by a boom. In March, 1929, plaintiffs had 10,000 cords to float down and some of it reached the pond and boom in Brattleboro on March 29, where the plaintiffs held it because the Connecticut was then at high water. Prior to April 3, 4000 cords had reached and been held there. On that date plaintiffs cut the West River boom and the wood entered the Connecticut. The remainder of the wood coming down later floated on through to Hinsdale without detention. The town of Brattleboro required taxes to be paid on the wood that was in that town on April 1, that is, so much of the wood as was then being held in the pond. To recover the money so paid, the plaintiff brought this suit. The Supreme Court of Vermont reversed the county court's judgment for the plaintiff.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The Vermont Supreme Court depended for its conclusions chiefly upon *Coe v. Errol*, 116 U. S. 517, which is the leading case on this subject. There logs had been cut on Wentworth's Location in New Hampshire during the winter and had been drawn down to Errol in the same state, and placed in Clear Stream and on the banks thereof on lands of John Akers and part on land of George C. Demeritt in said town, to be from thence floated down the Androscoggin river to the State of Maine (p. 518).

It is not clear how long they had lain there, but certainly for part of one winter season. This Court, speaking by Mr. Justice Bradley, sought to fix the time when such logs, in the course of their being taken from New Hampshire to Maine, ceased to be part of the mass of property of New Hampshire and passed into the immunity from state taxation as things actually in interstate commerce. The learned Justice states the rule to be:

"That such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they had been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey." \* \* \*

The question here then is: Where did the interstate shipment begin? When the wood was placed in the waters of the West river in the towns of Jamaica, Stratton, Londonderry and Winhall, or at the boom in Brattleboro? The whole drive was 10,000 cords. Six thousand cords of that, shipped from these towns after the 3d of April, went through directly to Hinsdale, N. H., without stopping. Certainly that was a continuous passage, and the wood when floating in the West River

was as much in interstate commerce as when on the Connecticut. Why was it any more in interstate commerce than that which had been shipped before April 3d from the same towns for the same destination by the same natural carrying agency, to wit, the flowing water of the West and Connecticut Rivers? Did the fact that before April 3d the waters of the Connecticut were frozen, or so high as to prevent the logs reaching Hinsdale, requiring a temporary halting at the mouth of the West River, break the real continuity of the interstate journey? We think not. The preparation for the interstate journey had all been completed at the towns on the West River where the wood had been put in the stream. The boom at the mouth of the West River did not constitute an entrepôt or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of his own except to facilitate the safe delivery of the wood at Hinsdale on their final journey already begun. The logs were not detained to be classified, measured, counted, or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey that, but for natural causes, over which he could exercise no control, would have been actually continuous. This was not the case in *Coe v. Errol*. It is evident from the statement of that case, and Mr. Justice Bradley's language that the logs were partly drawn and partly floated to Errol, and deposited some in the stream and some on the banks, where "they were to remain until it should be convenient to send them to their destination," and they were being gathered there for the whole previous winter season. It was an entrepôt or depot, as the Justice several times describes it. The mere fact that the owner intended to send them out of the state under such circumstances did not put them into transit in interstate commerce. But here we have the intention put into accomplishment by launching, and manifested by an actually continuous journey of more than half the drive, with a halting of less than half of it in the course of the interstate journey to save it from loss, and only for that purpose.

The case at bar is easily distinguishable from the other cases cited by the Vermont Supreme Court. In *Bacon v. Illinois*, 227 U. S. 504, Bacon had bought shipments of grain in transitu from Western states to New York in the contract for which the carriers had given the shipper the right to remove it "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination." On arrival of the grain in Chicago, Bacon removed the grain from the cars to his private elevator. This removal was for the purpose of inspecting, weighing, grading, mixing, etc., but not to change its ownership, consignee, or destination. It was held that, whatever his intention, the grain was at rest, within his complete power of disposition, and

held for his own benefit and was taxable. His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey. It was to enable him to treat the grain, so as to enable him more conveniently to dispose of it. He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the state.

So, in *General Oil Co. v. Crain*, 209 U. S. 211, the Oil Company had its principal place of business in Memphis, Tenn., for the manufacture and sale of illuminating oils in interstate commerce. It imported oil from other states and put it into a tank, appropriately marked for distribution in smaller vessels to fill orders for oil already sold in Arkansas, Louisiana, and Mississippi. The Court held that the first shipment had ended, that its storage at Memphis for division and distribution to various points was for the business purposes and profit of the company. The Court continued:

"It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation." \* \* \*

The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. *State v. Engle*, 34 N. J. L. 425; *State v. Carrigan*, 39 N. J. L. 35. This was the case in *Kelley v. Rhoads*, 188 U. S. 1, in which sheep driven 500 miles from Utah to Nebraska which traveled nine miles a day were held immune from taxation in Wyoming where they stopped and grazed on their way. Another instance is as to that part of the logs in *Coe v. Errol*, which were not before this court because the Supreme Court of New Hampshire had found them nontaxable in New Hampshire. They were cut in Maine and were floated down the Androscoggin on their way to Lewiston, Me., but were delayed for a season at Errol, N. H., because of low water. In the cases just cited the transit had begun in one state and was continued through another on the way to a third. This circumstance strengthened the inference that the interruption in the intermediate state did not destroy interstate continuity of the trip. But this was not always so, as *Bacon v. Illinois* and *General Oil Co. v. Crain* show. In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains

to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied.

Of all the cases in this court where such movable property has been held taxable, none is nearer in its facts than *Coe v. Errol* to the case at bar. We have pointed out the distinction between the two, which requires a different conclusion here.

Reversed.

#### NOTES

1. Blasius was a trader in livestock in the stockyards of St. Paul. On April 30, 1929, he bought eleven head of cattle from a commission agent to whom they had been consigned from outside the state. Upon purchase Blasius placed the cattle in a pen in the yards where he offered them for sale to any purchaser. In part May 1 and in part May 2, he sold them for immediate shipment to other states. The Supreme Court held that he was properly required to list as taxable the eleven head held by him on May 1, annual day for assessment, since they were not being held for the purpose of promoting their safe or convenient transit but for the profit of the owner. The "current of commerce" doctrine of *Stafford v. Wallace* accounted for the power of Congress to regulate the dealings of traders like Blasius, but gave no immunity from state taxation of commodities that had "come to rest" and thus gained a tax situs in the state. *Minnesota v. Blasius*, 290 U. S. 1, 78 L. ed. 131, 54 Sup. Ct. 34 (1933).

2. In *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. 643 (1923), oil shipped into Texas and held there in the owner's warehouses for sale in unbroken original packages was held subject to an occupation tax exacted by Texas. *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. 365 (1904) held that a merchant's tax might be imposed by Tennessee upon a nonresident manufacturing corporation shipping its products to Memphis as a distributing point, from which they were delivered in the original packages by a local agent to customers in that or other states, according to directions of the manufacturer. A recent case upholding a tax imposed by a township on the storage of coal shipped in interstate commerce from the mines to the place where it was held in storage by the carrier and thereafter reshipped as the shipper might direct, is *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 91 L. ed. 1346, 67 Sup. Ct. 1062 (1947). See *Powell*, *Taxation of Things in Transit*, 7 Va. L. Rev. 167, 245, 429, 497 (1920-21).

#### ADAMS EXPRESS CO. v. OHIO STATE AUDITOR.

Supreme Court of the United States, 1897.  
165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. 305.

[The case involved the validity of the assessment for taxation by the State of Ohio of the property in Ohio of the Adams Express Company, for three separate years, the assessment for 1893 being typical. The company was organized under the laws of New York. Its only tangible property in Ohio in 1893 consisted of personality, chiefly office furniture, horses and wagons, having a value of \$53,080 and real estate valued at \$25,170. The latter was taxed separately. The board of assessors fixed the company's assessment at \$460,033. This

was done under a statute which required every express company doing business in the state to state to the board the par value and the market value of all its shares, its gross receipts from business done within the state, and all its real and personal property in the state. The statute further provided: "Said board of appraisers and assessors shall, in the determining the value of the property of said companies in this state to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said company, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." An affidavit of a member of the board states: "Taking all the information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of the personal property made, and the character thereof, and evidence of undervaluations and omissions therein, the number of officers, the amount of business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the board, in each instance, ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein; being guided, in determining the value of the property, by the value of the entire capital stock, and other evidence and information before the board." 69 Fed. 552.

The company brought a bill in the Circuit Court of the United States to enjoin the board from certifying to the counties the proportion of the gross assessment to be collected in each county. The court dismissed the bill. The dismissal was affirmed by the Circuit Court of Appeals. 69 Fed. 546, and an appeal was taken to the United States Supreme Court.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the Court.  
\* \* \*

This brings us to the only inquiry which it concerns us to examine. The legislation in question is claimed to be repugnant to the Constitution of the United States because in violation of the commerce clause of that instrument, and because operating to deprive appellants of their property without due process of law, and of the equal protection of the laws.

We assume that the assessments complained of were made in pursuance of the definite rule or principle of appraisement recognized and established by the Nichols law, as construed by the Supreme Court of Ohio, and the question is whether the law prescribing that rule is valid under the Federal Constitution.

The principal contention is that the rule contravenes the commerce clause because the assessments, while purporting to be on the property of complainants within the State, are in fact levied on their business, which is largely interstate commerce.

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688.

As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction. \* \* \* The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State, is in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, *Pittsburgh etc. Railway v. Backus*, 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States, *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real

estate and machinery subject to local taxation within the State, *Western Un. Tel. Co. v. Taggart*, 163 U. S. 1. \* \* \*

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

We repeat that while the unity which exists may not be physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience of pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.

The same party may own a manufacturing establishment in one State and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store or vice versa, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different States is an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

\* \* \*

The line of reasoning thus pursued is in accordance with the decisions of this court already cited. Assuming the proportion of capital employed in each of several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce. \* \* \*

Decrees affirmed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE HARLAN and MR. JUSTICE BROWN, dissented.

On rehearing (166 U. S. 185, 41 L. ed. 965, 17 S. Ct. 604). MR. JUSTICE BREWER said in part:

\* \* \* Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a State to interfere

with interstate commerce does not in the least degree abridge the right of a State to tax at their full value all the instrumentalities used for such commerce.

Now the taxes imposed upon express companies by the statutes of the three States of Ohio, Indiana, and Kentucky are certainly not in terms "privilege taxes." They purport to be upon the property of the companies. They are, therefore, not, in form at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective states. And the only really substantial question is whether, properly understood and administered, they subject to the taxing power of the state property not within its territorial limits. \* \* \*

#### NOTES

1. In valuing property of companies engaged in interstate commerce for purposes of state taxation, the Supreme Court (as the principal case indicates) has long recognized the so-called "unit rule" which entitles a state to take the aggregate value of all the company's properties wherever located (such valuation including not only the value of the actual physical property but also the enhancement due to the fact that an entire operating system is being dealt with as a unit) and to tax a proportion of such value based on some formula such as the ratio of the mileage of a railroad company's tracks within the state to the whole number of miles over which its cars are run in all states. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 11 Sup. Ct. 876 (1891). The mileage formula may not be used, however, where it results in taxation of assets outside the state which do not add to the value of the physical property of the company and the rights exercised by it in the state. *Wallace v. Hines*, 253 U. S. 66, 64 L. ed. 782, 40 Sup. Ct. 435 (1920). The unit rule, while generally upheld, may in some instances produce a valuation so grossly in excess of the actual value of the property and so unreasonable when compared with assessments upon other similar property in the state as to run afoul of the due process and equal protection guaranties of the Fourteenth Amendment, as well as the commerce clause. *Union Tank Line v. Wright*, 249 U. S. 275, 63 L. ed. 602, 39 Sup. Ct. 276 (1919). See *Isaacs*, *The Unit Rule*, 35 *Yale L. J.* 838 (1926).

2. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 93 L. ed. 585, 69 Sup. Ct. 432 (1949), distinguishing earlier cases denying the states power to tax vessels engaging in interstate commerce, other than at the domicile of the owner, upheld an ad valorem tax on the barges and tow boats of a foreign corporation operating interstate on inland waters in the taxing state, where the tax was apportioned on a ratio of the number of miles of the company's lines in the state and the number of miles of the entire barge line. The court said: "We see no practical difference so far as either the due process clause or the commerce clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the commerce clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C. & St. L. R. Co. v. Browning*, 310 U. S. 362, 365. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state. See

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state."

3. In *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 88 L. ed. 1283, 64 Sup. Ct. 950, 153 A. L. R. 245 (1944) the court, in a five-to-four decision, sustained an ad valorem tax imposed by Minnesota on an entire fleet of airplanes operated in interstate commerce by a domestic corporation, although the scheduled route mileage of the company in Minnesota was only 14% of its total scheduled route mileage and only 16% of the daily plane mileage of the company's interstate planes was within the state. There was no "opinion of the court" as the justices comprising the majority were unable to agree on the reasons. The opinion of Justice Frankfurter, concurred in by two other justices, was based on the view that the state of a corporation's legal domicile, because of the protection and benefits extended by it, is entitled to tax personal property owned by the corporation which has acquired no permanent situs in another state. Justices Black and Jackson wrote separate concurring opinions. Chief Justice Stone's dissenting opinion, in which Justices Roberts, Reed and Rutledge joined, said that in allowing Minnesota to tax an entire fleet of airplanes operated in interstate commerce, the court was leaving other states free to impose further or comparable taxes on the same property for the same tax period, thus making possible a prohibited burden on interstate commerce. See Powell, Note, 57 Harv. L. Rev. 1097 (1944).

4. In *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 98 L. ed. 967, 74 Sup. Ct. 757 (1954), a Nebraska apportioned ad valorem property tax levied on the flight equipment of an interstate air carrier which made regularly scheduled stops within the state but was not incorporated there and did not have its place of business or home port there, was upheld against the several contentions that the tax was precluded by federal regulation of interstate air commerce, that it burdened interstate commerce and that the airplanes were immune from taxation, having acquired no taxable situs within the state. Justices Frankfurter and Jackson dissented.

### ROBBINS v. SHELBY COUNTY TAXING DISTRICT.

Supreme Court of the United States, 1887.

120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. 592.

[A Tennessee statute required "all drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, \* \* \* therein, by sample," to pay a license tax of \$25 per month. Robbins was convicted of drumming without a license, on evidence that he solicited buyers in Shelby County as a drummer for a firm whose place of business was in Cincinnati, Ohio. The state supreme court sustained the conviction and this writ of error was taken.]

MR. JUSTICE BRADLEY delivered the opinion of the Court. \* \* \*

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or

a merchant of one state to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly, and without due attention to the truth of things. \* \* \*

The truth is, that in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant, visiting New Orleans or Jacksonville for pleasure or for his

health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent, but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution; and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirements of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege, cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former, independent of the latter, and free from any interference or restraint from them.

To deny to the state the power to lay the tax or require the license in question, will not, in any perceptible degree, diminish its resources, or its just power of taxation. It is very true that, if the goods when sold were in the state, and part of its general mass of property, they would be liable to taxation; but when brought into the state in consequence of the sale, they will be equally liable; so that, in the end, the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state, and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this Court in the case of *Brown v. Houston*, 114 U. S. 622. \* \* \* But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid

on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. \* \* \*

It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. \* \* \*

Judgment reversed.

[MR. CHIEF JUSTICE WAITE, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE GRAY, dissented.]

#### NOTES

1. The holding of the principal case was reaffirmed in *Nippert v. Richmond*, 327 U. S. 416, 90 L. ed. 760, 66 Sup. Ct. 586, 162 A. L. R. 844 (1946), where an ordinance of Richmond, Virginia, which imposed an annual license tax on all sales-solicitors was held invalid as applied to *Nippert*, who solicited orders for the sale of merchandise to be filled by subsequent interstate shipments. Justices Black, Douglas and Murphy dissented.

2. In contrast with the drummer, the itinerant salesman or "peddler" who carries goods with him for immediate delivery to the customer is engaged in intrastate business and hence subject to state or municipal privilege taxes. *Wagner v. Covington*, 251 U. S. 95, 64 L. ed. 157, 40 Sup. Ct. 93 (1919); *Caskey*

Baking Co. v. Virginia, 313 U. S. 117, 85 L. ed. 1223, 61 Sup. Ct. 881 (1941). However, license fees which discriminate against the peddler of articles grown, produced or manufactured outside the taxing state are invalid. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347 (1876). *Cf. Howe Machine Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754 (1880), holding that where a state statute applies alike to the sale of articles manufactured within the state and to those manufactured outside the state, and the exaction is not an unreasonable one, the requirement of a license fee for the privilege of peddling within the state is valid.

3. A Mississippi tax upon persons soliciting business for laundries not licensed in the state was held to burden interstate commerce, whether the tax be regarded as one on the solicitation of business or on the activities of picking up and delivering laundry. The court said: "In the long line of 'drummer' cases, beginning with *Robbins v. Shelby County Taxing District*, 120 U. S. 489, this court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce." *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 96 L. ed. 436, 72 Sup. Ct. 424 (1952).

### BEST & CO. v. MAXWELL.

Supreme Court of the United States, 1940.  
311 U. S. 454, 85 L. ed. 275, 61 Sup. Ct. 334.

MR. JUSTICE REED delivered the opinion of the Court.

Appellant, a New York retail merchandise establishment, rented a display room in a North Carolina hotel for several days during February, 1938, and took orders for goods corresponding to samples; it filled the orders by shipping direct to the customers from New York City. Before using the room appellant paid under protest the tax required by chapter 127, § 121 (e), of the North Carolina Laws of 1937, which levies an annual privilege tax of \$250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders. Appellant not being a regular retail merchant of North Carolina admittedly comes within the statute. Asserting, however, that the tax was unconstitutional, especially in view of the commerce clause, it brought this suit for a refund and succeeded in the trial court. The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand. The prevailing opinion characterized the tax as one on the commercial use of temporary quarters, which in its operation did not discriminate against interstate commerce and therefore did not come into conflict with the commerce clause.

The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we

think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as "regular retail merchants in the State of North Carolina." The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of \$1 per annum for the privilege of doing business. Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this \$250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A \$250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market. Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

Reversed.

RALEY & BROS. v. RICHARDSON.

Supreme Court of the United States, 1924.  
264 U. S. 157, 68 L. ed. 615, 44 Sup. Ct. 256.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

A statute of Georgia (Acts 1921, p. 46, par. 30) imposes a flat tax of \$100 upon any broker or commission merchant buying or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The bill filed below sought to enjoin the collection of the tax on the ground that the statute violates the Commerce Clause of the federal Constitution and also, contingently, upon the further ground that the statute is void under the equal protection clause of the Fourteenth Amendment.

The complainants were divided into two classes, A and B. The business of those in Class B was to solicit orders for goods from dealers in Georgia, which orders were sent to be filled, sometimes to nonresident and sometimes to resident principals, the greater part of the business being with nonresident principals. The business of those in Class A was wholly confined to representation of nonresident principals. Upon acceptance of an order the goods are shipped by the principal to the purchaser, but remain the property of the former until the time of sale.

The trial court sustained the tax as to Class B and enjoined its collection as to Class A, and its judgment was affirmed by the Supreme Court, 154 Ga. 140. We are concerned here with the judgment only in so far as it affects Class B.

The contention is that the tax is laid, expressly, upon all brokers and commission merchants in the state and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer v. Stewart*, 197 U. S. 60, 69. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business.

There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon those engaged in domestic business and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a state is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the state observe the rule of equality among the persons subject to its taxing power.

Affirmed.

#### NOTE

1. While a foreign corporation engaged in interstate commerce does not, by entering into local business, lose its right to tax immunity on its interstate

business, it cannot channel business through a local retail outlet to gain the advantage of a local business, without subjecting itself to a retailer's occupation tax based on gross receipts from sales to its customers within the state. Norton Co. v. Department of Revenue of Illinois, 340 U. S. 534, 95 L. ed. 517, 71 Sup. Ct. 377 (1951), holding, however, that sales to customers sending orders directly to the home office which were filled by shipments directly to the customers should have been excluded from the tax base.

### ALPHA PORTLAND CEMENT CO. v. MASSACHUSETTS.

Supreme Court of the United States, 1925.

268 U. S. 203, 69 L. ed. 916, 45 Sup. Ct. 477, 44 A. L. R. 1219.

[Error to judgments of the Supreme Judicial Court of Massachusetts which had sustained a tax levied on the New Jersey corporation, plaintiff in error. The Massachusetts tax law provided: "Every foreign corporation shall pay annually, with respect to the carrying on or doing business by it within the Commonwealth, an excise equal to" the sum of (1)  $\frac{1}{2}$  of 1% of that proportion of the cash value of the shares of its capital stock as its assets employed in the state bore to its entire assets and (2)  $2\frac{1}{2}$ % of the net income derived from business done within the state. An elaborate method was prescribed for calculating item (2). The tax imposed on plaintiff for the year 1922 was, item (1), \$379.66 + item (2) \$187.91 = \$567.57. Other facts appear in the opinion.]

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Plaintiff in error claims that the Commonwealth illegally exacted of it \$800.45 as an excise tax for the year 1921, and \$567.57 plus \$22.97 interest for 1922. The court below upheld the tax and definitely ruled that it was not repugnant to the Fourteenth Amendment or the Commerce Clause of the federal Constitution. 244 Mass. 530; 248 Mass. 156. \* \* \*

We accept the following statements in the opinion below: "The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pennsylvania. Its mills are located in several other states outside of Massachusetts from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England states are conducted. The office is used as headquarters for travelling salesmen, who solicit orders in Massachusetts and the other New England states. Orders so taken are transmitted at the Boston office by mail to the principal office at Easton, Pennsylvania, where exclusively they are passed upon, and if accepted, the goods are shipped and invoices sent directly to the customer. Remittances usually are made to the petitioner at Easton, though in exceptional instances prepayments

or collections are made by the salesmen and immediately transmitted to Easton. No samples or other merchandise are kept in this commonwealth. The only property of the petitioner in Massachusetts is its office furniture, valued at \$573. It maintains no bank account here, its salaries and office rent being paid from its principal office. Incidental expenses are paid from an account not exceeding \$1,000 kept by the district sales manager in his own name. No corporate books, records, or meetings are in Massachusetts. There is no controversy as to the facts, valuations or computation of the tax. The issues between the parties relate solely to the correct interpretation of our corporate tax law as to foreign corporations and to the constitutionality of that law in its application to the petitioner. \* \* \* It is rightly conceded by the Attorney General that the petitioner was engaged in this commonwealth exclusively in interstate commerce." \* \* \*

Counsel for the Commonwealth assert: "The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the state. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce." "The taxes complained of were excises and not property taxes." "Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts." See *Judson Freight Forwarding Co. v. Commonwealth*, 242 Mass. 47.

This view of the nature of the exaction was adopted by the court below, and we think it is the correct one. The right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of two factors—the proportion of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?

*Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 153, 154, necessitates a negative reply. Under St. 1909, c. 490, Part III, § 56, the state demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the present cause. This Court said: "We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause." Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce

and is therefore invalid without regard to measure or amount. *Looney v. Crane*, 245 U. S. 178, 190; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 142; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259; *Texas Transport & Terminal Co. v. New Orleans*, 264 U. S. 150. \* \* \*

It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. \* \* \*

*Union Tank Line Co. v. Wright*, 249 U. S. 275, 282, *et seq.*, pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a state. We there declined to follow the rule applied in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 26, and held that determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well established principles. It must be read with the essential facts in mind. \* \* \*

The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in *Cheney Brothers Co. v. Massachusetts*, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden.

\* \* \*

Reversed.

MR. JUSTICE BRANDEIS dissents.

#### NOTES

1. *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. 190 (1910) was an action brought by Kansas in a state court to obtain a decree enjoining the Western Union Telegraph Company, a New York corporation, from transacting a local business within the state. The proceeding was based upon the refusal of the company to pay a fee of a specified per cent of its total authorized capital, representing all of its business and property, within and without the state. A statute of 1908 made the payment of the fee a condition of a foreign corporation's entering the state or continuing to do local business within it. Defendant's entire capitalization was \$100,000,000, on which the fee was \$20,100. Most of this capital was employed outside of Kansas. From a decree enjoining the company from transacting intrastate business in Kansas

but not affecting its interstate or federal governmental business, writ of error was prosecuted to the Supreme Court of the United States. Reversing this judgment, the court held that the condition sought to be enforced violated the commerce and due process clauses of the Constitution. A franchise tax on a foreign corporation engaged within a state in both intrastate and interstate commerce is invalid where it is measured by the total authorized capital stock, representing all its business and property. Such a tax imposes a burden on interstate commerce because it in effect taxes the corporation's entire business, including the interstate, and its property, wherever situated. What part of the tax exacted was to be attributed to the company's domestic business in Kansas and what part to interstate business, the state had made no effort to ascertain and declare.

2. A foreign corporation engaged in interstate commerce may be required, as a condition of being permitted to enter a state to do intrastate business, to pay an entrance fee measured by the amount of the corporation's authorized capital stock. *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 82 L. ed. 24, 58 Sup. Ct. 75 (1937). Here the court found no violation of the commerce, due process or equal protection clauses and justified its holding as follows: "The entrance fee is obviously not a charge laid upon interstate commerce; nor a charge furtively directed against interstate commerce; nor a charge measured by such commerce. Its amount does not grow or shrink according to the volume of interstate commerce or the amount of the capital used in it. The size of the fee would be exactly the same if the company did no interstate commerce in Virginia or elsewhere. The entrance fee is comparable to the charter, or incorporation, fee of a domestic corporation—a fee commonly measured by the amount of the capital authorized."

3. In *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. 1380 (1888) a lump sum license tax on the privilege of engaging in the telegraph business in the state was held invalid because no attempt was made to discriminate between the privilege of doing intrastate business and the privilege of doing interstate business, the court saying: "There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

4. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 92 L. ed. 1832, 68 Sup. Ct. 1475 (1948) upheld a Mississippi franchise tax imposed upon an interstate pipe-line company doing no local business in the state, based upon the value of capital used, invested or employed within the state, the tax having been construed by the highest state court as a recompense for the protection of the company's "local activities in maintaining, keeping in repair, and otherwise in manning" the pipe-line facilities used in transporting gas through the state. Mr. Justice Reed's opinion stated: "This court has drawn the distinction in the field of pipe-line taxation between state statutes on the privilege of doing business where only interstate business was done and those upon appropriate local incidents." Mr. Justice Frankfurter, with the concurrence of Chief Justice Vinson and Justices Jackson and Burton, dissented. Cf. the recent decision in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 Sup. Ct. 396 (1954).

## UNITED STATES GLUE CO. v. OAK CREEK.

Supreme Court of the United States, 1918.

247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. 499, Ann. Cas. 1918E, 748.

[On writ of error to review a decision of the Supreme Court of Wisconsin which had denied recovery by plaintiff, a Wisconsin corporation, of a tax paid under a general income tax law of that state. The statute provided that as to persons and corporations engaged in business the profits should be considered taxable income, and that any person including corporations "engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state," to be determined as stated in the opinion.]

MR. JUSTICE PITNEY delivered the opinion of the Court. \* \* \*

In order to determine what part of the income of a corporation engaged in business within and without the state (other than that derived from rentals, stocks, bonds, securities, etc.) is to be taxed as derived from business transacted and property located within the state, \* \* \* the gross business in dollars of the corporation in the state, added to the value in dollars of its property in the state, is made the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the state. The resulting fraction is taken by the income tax law as representing the proportion of the income which is deemed to be derived from business transacted and property located within the state. This formula was applied in apportioning plaintiff's net "business income" for the year 1911, and upon the portion thus attributed to the state, plus the income from rentals, stocks, bonds, etc., the tax in question was levied.

Plaintiff was and is a corporation organized under the laws of the State of Wisconsin, having its principal office and place of business in the Town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the state and in other states and foreign countries. Its net "business income" in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about \$124,000, derived from the following sources: (a) about \$16,000 from goods sold to customers within the state and delivered from its factory; (b) about \$65,000 from goods sold to customers outside of the state and delivered from its factory; (c) about \$31,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's branches in other states, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about \$7,000 from goods sold to customers outside of the state, the sales having been made and goods shipped from plaintiff's

branches without the state, these goods having been purchased by plaintiff outside of the state and shipped to plaintiff's factory in the state, and thence shipped before sale from the factory to the branches; (e) about \$5,000 from goods sold outside of the state, the sales having been made and goods shipped from said branches, and the goods having been purchased by plaintiff outside of the state and shipped from the points of purchase to the branches without coming into the State of Wisconsin.

No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the state was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the supreme court, that items (b) and (c) were not taxable because derived from interstate commerce.

Stated concisely, the question is whether a state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States.

It is settled that a state may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. \* \* \*

The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce, was the subject of consideration in *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 345, where the court, by Mr. Justice Bradley, said: "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government." Many previous cases were referred to.

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the state a part of every dollar received. On the other hand, in *Peck & Co. v. Lowe*, 247 U. S. 165, we held that

the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. I, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the federal Constitution because they happen to be engaged in commerce among the states. \* \* \*

Judgment affirmed.

MR. CHIEF JUSTICE WHITE concurs in the result.

#### INTERSTATE TRANSIT, INC. v. LINDSEY.

Supreme Court of the United States, 1931.

283 U. S. 183, 75 L. ed. 953, 51 Sup. Ct. 380.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Tennessee Act of 1927, c. 89, § 4, imposes upon concerns operating interstate motorbusses on the highways of the state a privilege tax graduated according to carrying capacity. It is \$500 a year for

each vehicle seating more than twenty and less than thirty passengers. The tax for eight such busses was demanded of Interstate Transit, Inc., an Ohio corporation which operates, exclusively in interstate commerce, a line from Cincinnati, Ohio, to Atlanta, Ga. The company made a quarterly payment under protest, and brought this suit to recover the amount paid, on the ground that the statute as applied violates the commerce clause of the Federal Constitution (Article 1, § 8, cl. 3). The trial court allowed recovery, but its judgment was reversed by the Supreme Court of the state. 161 Tenn. 56, 29 S. W. 2d 257. The case is here on appeal.

While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. *Kane v. New Jersey*, 242 U. S. 160, 168, 169; *Clark v. Poor*, 274 U. S. 554; *Sprout v. South Bend*, *supra*, pages 169, 170. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark v. Poor*, *supra*, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick v. Maryland*, 235 U. S. 610, 612; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 250-252. Compare *Interstate Busses Corp. v. Holyoke Street Ry.*, 273 U. S. 45, 51. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.

A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed, not as compensation for the use of the highways, but for the privilege of doing the interstate bus business. Chapter 89 of the Public Acts of 1927 deals with practically all of the taxes laid by the state, except those relating to highways. It is entitled "An Act to provide for General Revenue for the State of Tennessee and the counties and municipalities thereof, to be known as the General Revenue Bill." The scope of this statute conforms to the title. It consists of twenty-one sections. The first three impose general property, inheritance, and merchants' capital taxes. Section 4, under which the tax challenged is laid, declares "that each vocation, occupation and business hereinafter named in this section, is hereby declared to be a privilege, and the rate of taxes on such privileges shall be as hereinafter fixed." Then follows a schedule occupying

53 pages, in which 160 businesses are arranged, in the main, alphabetically, and in which the several motorbus businesses have their appropriate places. This is followed by six additional sections which deal exclusively with similar privilege taxes. The remaining sections relate to enforcement.

The tax on interstate busses is of the same character as the tax laid for the privilege of engaging in every other line of business. The taxes for the several businesses range from \$2.50 to \$5,000, and since they differ widely in amount even for the same business, appear to be graduated according to the assumed earning capacity. In most, the amount demanded increases with the population of the city, town, or district in which the business is carried on. For some a different basis of gauging probable earning power is adopted. On warehouses the tax is graduated according to storage capacity. On theaters it is graduated according to seating capacity. On the business of operating busses it likewise varies according to seating capacity. The latter tax is specified separately for interstate busses, for intrastate busses operating in more than one county, and for those operating in a single county. But this separation appears to be made solely because of the allocation of the proceeds of the tax. For the rate of taxation is the same for each, and varies solely with the carrying capacity of the bus; there being steep increases from \$50 a year for one carrying not more than five passengers to \$750 for one carrying over thirty.

The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting section 4 of the 1927 act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds "shall go and belong exclusively to the General Funds of the State." On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the highway fund. The present system of motor regulations was inaugurated in 1915. At the same session, the Legislature created a State Highway Commission with power to construct and maintain highways. In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one-mill road tax, and authorizing the issue of bonds for the construction of highways and bridges—the Legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the commission exclusively for the construction and maintenance of highways or bridges. The absence in section 4 of this provision, which characterizes almost

every other Tennessee statute relating to the construction and maintenance of highways, or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business.

It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare *Gundling v. Chicago*, 177 U. S. 183, 189. But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. *Clark v. Poor*, *supra*. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory.

Reversed.

MR. JUSTICE McREYNOLDS is of opinion that the judgment should be affirmed.

#### EASTERN AIR TRANSPORT, INC. v. SOUTH CAROLINA TAX COMMISSION.

Supreme Court of the United States, 1932.  
285 U. S. 147, 76 L. ed. 673, 52 Sup. Ct. 340.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This suit was brought to restrain the collection of a tax, imposed by the State of South Carolina, of six cents a gallon with respect to gasoline purchased by complainant in that State and used by complainant in interstate commerce. The complainant charged that the state Act placed a direct burden upon interstate commerce and hence was repugnant to the commerce clause of the Federal Constitution. Art. I,

§ 8. The District Court, composed of three judges as required by statute, denied an interlocutory injunction, 52 Fed. (2d) 456, and the complainant appeals to this Court. Jud. Code, § 266; U. S. C., Tit. 28, § 380.

From the findings of the District Court it appears that the complainant is a Delaware corporation operating, in interstate commerce, air transport lines across the State of South Carolina; that its planes make regular stops at various points in the State but do not carry freight or passengers between such points, and practically its entire business is interstate in character; that it purchases gasoline in South Carolina for the use of its planes and that the seller adds to the price the amount of the state gasoline tax which the seller is required to pay under the Act in question, and thus complainant has to pay six cents a gallon more than it otherwise would, the excess amounting to about \$5,000 a year.

The tax is described in the statute as a license tax, which, as applied in the instant case against the dealer, is for the privilege of carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Co. v. Query*, Supreme Court of South Carolina, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce. "It is elementary," said the Court in *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346, "that a State may tax property used to carry on interstate commerce." Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 395. Undoubtedly, purchases of goods within a State may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing

a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

In *Helson v. Kentucky*, 279 U. S. 245, upon which the appellant relies, the tax was laid by Kentucky with respect to gasoline purchased by the plaintiffs in error in Illinois and used within Kentucky in the operation of a ferry boat on the Ohio River between the two States. The Court found that the tax was laid directly upon the use of the gasoline in interstate transportation. The Court said that "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.*, p. 252. Such a tax is manifestly different from a general property tax or a tax upon purely local sales.

Decree affirmed.

#### NOTE

1. Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance of the highways reasonably related to the use made thereof. A state may, therefore, because of its proprietary interest in its highways, exact a reasonable and nondiscriminatory fee from those using them for interstate commerce business as well as from those using them for local transportation purposes only. As *Interstate Transit v. Lindsey* makes clear, the charge is deemed compensation for the use of facilities furnished and necessary to help defray the expense of regulating motor traffic. Taxation of the sale of gasoline used by motor vehicles transporting goods in interstate commerce is justified as a measure suitable to that end. Licensing, registration and permit fees are also permissible for the same reason, if reasonable in amount and nondiscriminatory in character. *Sprout v. South Bend*, 277 U. S. 163, 72 L. ed. 833, 48 Sup. Ct. 502, 62 A. L. R. 45 (1928); *Hicklin v. Coney*, 290 U. S. 169, 78 L. ed. 247, 54 Sup. Ct. 142 (1933); *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, 79 L. ed. 1439, 55 Sup. Ct. 709 (1935).

As such taxes are not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. Nor is it necessarily important that a part of the fees collected is not devoted directly to highway maintenance, where some of the cost thereof comes from the proceeds of a general property tax. Such exactions, however, must not be disguised methods for taxing the privilege of doing interstate business and will be held invalid where it is established that they bear no reasonable relation to the costs of the ostensible purposes for which they are levied. For cases containing good discussions of the problems involved, see *Morfi v. Bingaman*, 298 U. S. 407, 80 L. ed. 1245, 56 Sup. Ct. 756 (1936); *Ingels v. Morfi*, 300 U. S. 290, 81 L. ed. 653, 57 Sup. Ct. 439 (1937); *Clark v. Paul Gray*, 306 U. S. 583, 83 L. ed. 1001, 59 Sup. Ct. 744 (1939); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U. S. 495, 92 L. ed. 99, 68 Sup. Ct. 167 (1947); *Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 94 L. ed. 1053, 70 Sup. Ct. 806, 17 A. L. R. (2d) 407 (1950).

State taxation of gasoline introduced into the state in the tank of a vehicle, for use in propelling it in interstate commerce, has been held to burden such commerce where it does not appear on the face of the statute or it is not otherwise demonstrable that the tax has some fair relationship to the use of the highways for which the charge is made. See, *e. g.*, *Bingaman v. Golden Eagle*

Western Lines, 297 U. S. 626, 80 L. ed. 928, 56 Sup. Ct. 624 (1936); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 84 L. ed. 683, 60 Sup. Ct. 504 (1940). For annotations on state taxation of motor vehicles as affected by the commerce clause, see 75 L. ed. 953 (1931), and 92 L. ed. 109 (1948). For a discussion of the earlier cases, see *Kauper, State Taxation of Interstate Motor Carriers*, 32 Mich. L. Rev. 1, 71, 351 (1933-1934).

### SOUTHERN PACIFIC CO. v. GALLAGHER.

Supreme Court of the United States, 1939.

306 U. S. 167, 83 L. ed. 586, 59 Sup. Ct. 389.

MR. JUSTICE REED delivered the opinion of the Court.

The California Use Tax Act of 1935 is assailed as violative of the commerce clause and the Fourteenth Amendment, when imposed upon tangible personal property, bought outside of the state by the Southern Pacific Company, an interstate railroad, and installed on importation, or kept available for use, as a part of its transportation facilities.

The attack comes by means of a bill of the Southern Pacific Company seeking, before a three-judge district court, an interlocutory and final injunction against the State Board of Equalization of California, its members and the Attorney-General of the state, to restrain them from enforcing the Use Tax Act. The trial court granted an interlocutory injunction and denied a motion to dismiss but later refused a permanent injunction and sustained the motion to dismiss. The case comes here by appeal.

The Use Tax Act is complementary to the California Retail Sales Tax Act of 1933. The latter levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the former imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax Act of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is "every person, engaged in the business of making sales for storage, use or other consumption"; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any "keeping or retention" with a similar exemption; and a taxpayer includes everyone "storing, using or otherwise consuming" the property subject to the use tax.

The principle of the use tax as applied to property brought into the state after its retail purchase for intrastate use has been upheld in *Henneford v. Silas Mason Co.*, [300 U. S. 577] against the charge that it was a tax upon the operations of interstate commerce or a tax upon a foreign sale, violative of the Fourteenth Amendment. \* \* \*

The appellant, the Southern Pacific Company, a Kentucky corporation, handles intrastate, interstate and foreign commerce over its railroad system which traverses a number of states and connects with the lines of carriers covering the continent. The findings and stipulation of facts show continual extrastate purchases of tangible personalty for the operation of the road; rails, equipment, machinery, tools and office supplies. Some of the purchases are used in the general offices of the corporation, located in California, for the supervision of the wide-flung activities; others are for material kept in readiness as a stand-by supply to replace or repair equipment damaged, destroyed or worn out in the operation of the road; and still others are to make improvements, replacements or extensions pursuant to previously determined plans and specifications. Few, if any, of the supplies are stored for long term needs. Storage is merely incidental to protection until use, as office supplies in a closet or an extra frog at a section tool house. For construction or reconstruction upon a large scale, special orders are given and arrangements made, so that the material is fabricated for a particular use in the transportation facilities, shipped to its California destination and installed upon arrival. To avoid delay and cost the movement from loading to final placement is as nearly continuous as managerial efficiency can contrive. While some articles are capable of general use, the major purchases of rails, repair parts and supplies for the maintenance and operation of the system are adapted only to railroad use. The purchases are paid for out of railroad operating capital and move on company material waybills, without transportation charge. All purchases may be said to be dedicated to consumption in the interstate transportation business of appellant. No new rolling stock is involved. Subsequent to repairing and reconditioning, rolling stock moves again in interstate transportation, as do cars after being stocked with supplies. The California tax on storage or use, it is said, cannot apply to these articles, as such a tax would be an unconstitutional burden upon the facilities of interstate commerce, of which the articles are a part.

There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. They point to the definition of use as the exercise of a right of ownership, and of storage as any keeping or retention. By the definitive terms themselves, it is urged, the taxable events are retention and installation, not such storage as warehousing connotes, or use in the sense of consumption or operation. If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not, in effect, upon commerce, and forbidden.

Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages, or freight shipments. A license tax on sales by samples burdens one selling only goods from other states. A tax as applied to the business of interstate communication is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself. This rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting, and a general tax at specified rates upon the gross income of every resident, construed as "a tax upon gross receipts from commerce" "without apportionment." The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies is upheld.

Appellant selects from this line the *Helson* case [*Helson & Randolph v. Kentucky*, 279 U. S. 245] as determinative of the contention that a tax on use of supplies or equipment is a tax on the commerce. A state tax of three cents per gallon was imposed on all gasoline "sold at wholesale." This phrase was defined to include gasoline bought out of the state and used within the state. There was no definition of the word use or used. The taxpayers operated an interstate ferry, purchased gasoline in Ohio and used that portion sought to be taxed in propelling their craft in the territorial waters of Kentucky. The court considered the tax on the consumption of the gas the same as a tax on the operation of the ferry boat and therefore invalid under the rule discussed in the preceding paragraph.

The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event distinct from its consumption in commerce. Particular attention is called by the state to the *Wallace* case. [*Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249]. There the tax was on "selling or storing or distributing gasoline." It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state, "when all is withdrawn and used \* \* \* as a source of motive power in interstate railway operation" and valid against the objection that "it is in effect a tax upon the use" in interstate commerce. The invalidity of such a tax arises from a levy on

commerce itself or its gross receipts, not upon events prior to the commerce.

The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analogous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specifications suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon "use or storage," no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. *Champlain Co. v. Brattleboro* [260 U. S. 366] and *Carson Petroleum Co. v. Vial* [279 U. S. 95] are therefore inapplicable. *Bacon v. Illinois* [227 U. S. 504], where taxation of grain during stoppage in transit was validated, presents a closer analogy. "Practical continuity" does not always make an act a part of interstate commerce. This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.

But it is urged by the appellant that our former opinions make this conclusion a departure from precedent; the events are so close to or so inseparably intertwined with interstate commerce, as to be a part of it. *Cooney v. Mountain States Telephone Co.* [294 U. S. 384] is cited to show that a "state excise tax cannot be validly applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce." The Telephone Company

was taxed a sum on each telephone in use. As the instrument was employed part of the time in interstate commerce, this Court held the tax to be upon that commerce and invalid. Since there was no apportionment the entire tax fell. Unless the taxable events here, all of which are intrastate, are in effect a part of interstate commerce, our previous discussion of their separable character would render the Cooney case inapplicable. For this point we are referred to *Puget Sound Co. v. Tax Commission* [302 U. S. 90] and *Ozark Pipe Line Corp. v. Monier* [266 U. S. 555].

In the former case, the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held nontaxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is applicable here. The invalid tax in the *Puget Sound* case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency. Here, under our analysis, we find only intrastate events taxed. \* \* \* Affirmed.

[JUSTICE BLACK concurred in the result. JUSTICE ROBERTS took no part, and JUSTICES BUTLER and McREYNOLDS dissented.]

#### NELSON v. SEARS, ROEBUCK & CO.

Supreme Court of the United States, 1941.

312 U. S. 359, 85 L. ed. 888, 61 Sup. Ct. 586, 132 A. L. R. 475.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves the constitutionality of the Iowa Use Tax (Ia. Code 1939, §§ 6943.102-6943.125) as applied to respondent's mail order business conducted directly between customers in Iowa and respondent's mail order houses located outside Iowa. The Supreme Court of Iowa, in a five to four decision, held for respondent on that issue. 228 Ia. 1273; 292 N. W. 130. We granted certiorari because of the importance of the constitutional question presented. Jud. Code § 237 (b); 28 U. S. C. § 344 (b).

The Iowa Use Tax is complementary to the Iowa Retail Sales Tax. Ia. Code 1939, §§ 6943.074, *et seq.* It is a tax on the use in Iowa of tangible personal property at the rate of two per cent of the purchase price. "Use," so far as material here, is defined as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property." § 6943.102. While the tax is imposed on "every person using such property within this state until such tax has been paid" (§ 6943.103), it is further provided (§ 6943.109) that every "retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state \* \* \* shall at the time of making such sales, whether

within or without the state, collect the tax imposed by this act from the purchaser. \* \* \* By § 6943.112 the tax constitutes a "debt owed by the retailer" to the state. And if the retailer fails to collect the tax, etc., his retailer's permit (§ 6943.084) may be revoked; and in case of a foreign corporation, its permit to do business in the state as well. § 6943.122.

Respondent is a New York corporation authorized since 1928 to do business in Iowa. It has various retail stores there. It pays the tax on sales made at those stores. It also pays the tax on orders placed at those stores, though shipment is made direct to the purchaser from one of respondent's out of state branches. But it has refused to collect the tax on mail orders sent by Iowa purchasers to its out of state branches and filled by direct shipments through the mails or a common carrier from those branches to the purchasers. On threat of petitioners to revoke respondent's permit because of such refusal, respondent brought this suit for an injunction, alleging, inter alia, that the Act as applied violates § 8 of Article I of the Constitution and the Fourteenth Amendment.

The Iowa Supreme Court held that if respondent had limited its activities to a mail order business of the kind here involved, it would not be doing business in Iowa; that, although technically the tax may be on the purchaser, it must be collected when the sale is made, at which time the property is outside the state; that these sales are separate and distinct from respondent's activities in Iowa. It therefore concluded that the tax as applied was unconstitutional since Iowa has no power to regulate respondent's activities outside the state or to regulate such activities as a condition to respondent's right to continue to do business in the state.

In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 280; *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 177; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa "has nothing on which to operate." *Wisconsin v. J. C. Penney Co.*, supra. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, "has been withdrawn from the arena of debate." *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583; *Southern Pacific Co. v. Gallagher*, supra. It is one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation "to place their orders in other states in the effort to escape payment of the tax on local sales." *Henneford v. Silas Mason Co.*, supra, p. 581. As pointed out in that case (p. 582), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use

after commerce is at an end." And see *Southern Pacific Co. v. Gallagher*, *supra*. Use in Iowa is what is taxed regardless of the time and place of passing title and regardless of the time the tax is required to be paid. *Cf. McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 49.

So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, and *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the "impotence of state power." *Wisconsin v. J. C. Penney Co.*, *supra*. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. *Cf. Wisconsin v. J. C. Penney Co.*, *supra*. Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts.

Nor is the mode of enforcing the tax on the privileges of these Iowa transactions any discrimination against interstate commerce. As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where "equality is its theme." \* \* \*

Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales. But cost and inconvenience inhered in the same duty imposed on the foreign corpora-

tions in the *Monamotor* and *Felt & Tarrant* cases. And so far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem.

The judgment is reversed and the cause is remanded to the Iowa Supreme Court for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE STONE took no part in the consideration or disposition of this case.

[MR. JUSTICE ROBERTS wrote a dissenting opinion with which CHIEF JUSTICE HUGHES concurred.]

### MCGOLDRICK v. BERWIND-WHITE COAL MINING CO.

Supreme Court of the United States, 1940.

309 U. S. 33, 84 L. ed. 565, 60 Sup. Ct. 388, 128 A. L. R. 876.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the New York City tax laid upon sales of goods for consumption, as applied to respondent, infringes the commerce clause of the Federal Constitution.

Upon certiorari to review a determination by the Comptroller of the City of New York that respondent was subject to New York City sales tax in the sum of \$176,703, the Appellate Division of the New York Supreme Court held that the taxing statute as applied to respondent does so infringe, 255 App. Div. 961; 8 N. Y. S. 2d 668, on the authority of *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208; 11 N. E. 2d 881, cert. den., 303 U. S. 656; *Matter of Compagnie Generale Transatlantique v. McGoldrick*, 279 N. Y. 192; 18 N. E. 2d 28. The New York Court of Appeals affirmed without opinion, 281 N. Y. 94, but its amended remittitur declared that the affirmance was upon the sole ground that the taxing statute as applied violated the commerce clause. We granted certiorari, 308 U. S. 546, the question presented being of public importance, upon a petition which challenged the decision of the state court as not in accord with applicable decisions of this Court in *Banker Brothers v. Pennsylvania*, 222 U. S. 210; *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169. \* \* \*

Pursuant to this authority [conferred by the New York statute] the municipal assembly of the City of New York adopted Local Law No. 24 of 1934 (published as Local Law No. 25), since annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By § 2 the tax was fixed at "two percentum upon the amount of the receipts from every sale in the city of New York," "sale" being defined by § 1 (e) as "any transfer of title or possession, or both \* \* \* in any manner or by any means whatsoever for a consideration or any agreement therefor." Another clause of § 2 commands that the tax "shall be paid by the purchaser to the vendor, for and on account of the City of New York." By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By §§ 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller, who is authorized by § 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him. It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, "consummated" there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts.

\* \* \*

Respondent, a Pennsylvania corporation, is engaged in the production of coal of specified grades, said to possess unique qualities, from its mines within that state and in selling it to consumers and dealers. It maintains a sales office in New York City and sells annually to its customers 1,500,000 tons of its product, of which approximately 1,300,000 tons are delivered by respondent to some twenty public utility and steamship companies. The coal moves by rail from mine to dock in Jersey City, thence in most instances by barge to the point of delivery. All the sales contracts with the New York customers in

question were entered into in New York City, and with two exceptions, presently to be considered separately, call for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships. In many instances the price of the coal was stated to be subject to any increase or decrease of mining costs including wages, and of railroad rates between the mines and the Jersey City terminal to which the coal was to be shipped. All the deliveries, with the exceptions already noted, were made within New York City, and all such are concededly subject to the tax except insofar as it infringes the commerce clause.

Section 8 of the Constitution declares that "Congress shall have power \* \* \* to regulate commerce with foreign Nations, and among the several States. \* \* \*" In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons v. Ogden*, 9 Wheat. 1, 187; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.

But is was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock v. Bureau*, supra, 253, and cases cited.

In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed. \* \* \*

Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, *cf.* *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the "use" of property which has just been moved in interstate commerce sustained in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86; *Henneford v. Silas Mason Co.*, *supra*; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62; *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co. v. Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249; *Edelman v. Boeing Air Transport*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. \* \* \*

If, as guides to decision, we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its

fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids. This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the "original package," effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, \* \* \* and when the extra-state seller has shipped them into the taxing state for sale there. \* \* \* It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. \* \* \*

The only challenge made to these controlling authorities is by reference to unconstitutional "burdens" on interstate commerce made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. See for example, *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217; *Cooney v. Mountain States Telephone Co.*, 294 U. S. 384; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650. Others will presently be discussed. But unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years \* \* \* the present tax must be upheld. As we have seen, the ruling of these decisions does not rest on precedent alone. It has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. \* \* \*

Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. \* \* \* As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. \* \* \* If coal situated as that in the present case was, before its delivery, subject to a state property tax, \* \* \* transfer

of possession of the coal upon a sale is equally taxable, \* \* \* just as was the storage or use of the property in similar circumstances, held taxable in Nashville, C. & St. L. Ry. Co. v. Wallace, supra; Henneford v. Silas Mason Co., supra.

Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.

But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing state taxing power seems as salutary in the one case as in the other. \* \* \*

It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins v. Shelby County Taxing District*, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See *Robbins v. Shelby County Taxing District*, supra, 498; *Caldwell v. North Carolina*, 187 U. S. 622, 632. In all, the statute, in its practical operation, was capable of

use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 625, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare *Hammond Packing Co. v. Montana*, 233 U. S. 331, *Magnano Co. v. Hamilton*, 292 U. S. 40, with *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Robbins v. Shelby County Taxing District*, supra; *Sprout v. South Bend*, 277 U. S. 163. It is enough for present purposes that the rule of *Robbins v. Shelby County Taxing District*, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate \* \* \* and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case.

Finally, it is said that the vice of the present tax is that it is measured by the gross receipts from interstate commerce and thus in effect reaches for taxation the commerce carried on both within and without the taxing state. *Adams Manufacturing Co. v. Storen*, 304 U. S. 307; *Gwin, White & Prince v. Henneford*, 305 U. S. 434. It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce. \* \* \*

In *Adams Manufacturing Co. v. Storen*, supra, 311, 312, a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. It was pointed out, pages 310, 311 and 312, that had the tax been conditioned upon the exercise of the taxpayer's franchise or its privilege of manufacturing in the taxing state, it would have been sustained, despite its incidental effect on interstate commerce since the taxpayer's local activities or privileges were sufficient to support such a tax, and that it could fairly be measured by the sales price of the goods. Compare *American Manufacturing Co. v. St. Louis*, 250 U. S. 459, with *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292. \* \* \*

The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce. \* \* \*

Reversed.

[CHIEF JUSTICE HUGHES delivered a dissenting opinion with which JUSTICES McREYNOLDS and ROBERTS concurred.]

McLEOD v. J. E. DILWORTH CO.

Supreme Court of the United States, 1944.  
322 U. S. 327, 88 L. ed. 1304, 64 Sup. Ct. 1023.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We are asked to reverse a decision of the Supreme Court of Arkansas holding that the Commerce Clause precludes liability for the sales tax of that State upon the transactions to be set forth.

We take the descriptions of these transactions from the opinion under review. Respondents are Tennessee corporations with home offices and places of business in Memphis where they sell machinery and mill supplies. They are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that state. Orders for goods come to Tennessee through solicitation in Arkansas by traveling salesmen domiciled in Tennessee, by mail or telephone. But no matter how an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas. \* \* \*

We agree with the Arkansas Supreme Court that the Berwind-White case presented a situation different from this case and that this case is on the other side of the line which marks off the limits of state power. A boundary line is none the worse for being narrow. Once it is recognized, as it long has been by this Court, that federal and state taxation do not move within wholly different orbits, that there are points of intersection between the powers of the two governments, and that there are transactions of what colloquially may be deemed a single process across state lines which may yet be taxed by the State of their occurrence, "nice distinctions are to be expected," Galveston, H. & S. A.

Ry. Co. v. Texas, 210 U. S. 217, 225. The differentiations made by the court below between this case and the Berwind-White case are relevant and controlling. "The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. \* \* \*" 205 Ark. at 786. This, according to practical notions of what constitutes a sale which is reflected by what the law deems a sale, constituted a sale in New York and accordingly we sustained a retail sales tax by New York. Here, as the Arkansas Supreme Court continued, "the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." Because the relevant factors in the two cases decided together with the Berwind-White case were the same as those in Berwind-White, the decision in that case controlled the two other cases. "In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the Berwind-White Company case." *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70, 77. In Berwind-White the Pennsylvania seller completed his sales in New York; in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.

It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. What ever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a state which the Commerce Clause was meant

to end. The very purpose of the Commerce Clause was to create an area of free trade among the several states. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the states.

The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself." *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it." *Wagner v. City of Covington*, 251 U. S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a state.

A very different situation underlay *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The Wisconsin Supreme Court and this Court were concerned with an exaction on a transaction which the Wisconsin Court described one way and we another. We looked behind the labels of the thing described, and the thing—taxation of the distribution of income earned in Wisconsin—did not offend the federal Constitution. That case affords no ground for rejecting the deliberate choice of a state to impose a tax on a transfer of ownership and sustaining it, where the transfer was made beyond the state limits, as a use tax on that property because the state might, so far as the federal Constitution is concerned, have enacted a use tax and such a use tax might have been collected on the enjoyment of the goods so sold. Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the area of free trade among the states.

Judgment affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting:

The present decision marks a retreat from the philosophy of the *Berwind-White* case, 309 U. S. 33. It draws a distinction between the use tax (*Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62) and the sales tax which on the facts of this case seems irrelevant to the power of Arkansas to tax. And it is squarely opposed to *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70, which should be overruled if the present decision goes down. \* \* \*

MR. JUSTICE RUTLEDGE also dissents. [For his opinion, see 322 U. S. 349, 88 L. ed. 1319, 64 Sup. Ct. 1030.]

GALVESTON, HARRISBURG & SAN ANTONIO  
R. CO. v. TEXAS.

Supreme Court of the United States, 1908.  
210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. 638.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action against certain railroads to recover taxes and penalties. The Supreme Court of the state held the penalties to be void under the state constitution, but upheld the tax. 97 S. W. Rep. 71. The railroads bring the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the states.

The act in question is entitled "An Act imposing a tax upon railroad corporations \* \* \* and other persons \* \* \* owning \* \* \* or controlling any line of railroad in this state \* \* \* equal to one per cent. of their gross receipts \* \* \*."

The lines of the railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326. The counsel for the state rely upon *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, and maintain, if necessary, that the later overrules the earlier case.

In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, supra, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. \* \* \* In *Maine v. Grand Trunk Ry. Co.* supra, the authority of the *Philadelphia Steamship Company* case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed, *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. *Adams Express Co. v. Ohio State Auditor*, 165

U. S. 194; 166 U. S. 171; *Fargo v. Hart*, 193 U. S. 490, 499. So it has been held that a tax on the property and business of a railroad operated within the state might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379.

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In *Wisconsin & Michigan Ry. Co. v. Powers*, *supra*, the measure of property by income purported only to be *prima facie* valid. But the extreme case came earlier. In *Maine v. Grand Trunk Ry. Co.* *supra*, "an annual excise tax for the privilege of exercising its franchise" was levied upon everyone operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state, when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company Case*. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697; *McHenry v. Alford*, 168 U. S. 651, 670, 671.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Telegraph Cable Co. v. Adams*, *supra*. See *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 158 U. S. 431, 438, 439. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look

for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan*, 185 U. S. 27, 37; *Asbell v. Kansas*, 209 U. S. 251, 254, 256.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax "equal to" one per cent. of gross receipts, and a tax of one per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state.

Judgment reversed.

[MR. JUSTICE HARLAN gave a dissenting opinion, in which concurred CHIEF JUSTICE FULLER and JUSTICES WHITE and McKENNA.]

#### WESTERN LIVE STOCK v. BUREAU OF REVENUE.

Supreme Court of the United States, 1938.

303 U. S. 250, 82 L. ed. 823, 58 Sup. Ct. 546, 115 A. L. R. 944.

MR. JUSTICE STONE delivered the opinion of the Court.

Section 201, chapter 7, of the New Mexico Special Session Laws of 1934, levies a privilege tax upon the gross receipts of those engaged in certain specified businesses. Subdivision I imposes a tax of 2 per cent. of amounts received from the sale of advertising space by one engaged

in the business of publishing newspapers or magazines. The question for decision is whether the tax laid under this statute on appellants, who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce.

Appellants brought the present suit in the state district court to recover the tax, which they had paid under protest, as exacted in violation of the commerce clause of the Federal Constitution. The trial court overruled a demurrer to the complaint and gave judgment for appellants, which the Supreme Court reversed. 41 N. M. 141, 65 P. (2d) 863. Appellants refusing to plead further, the district court gave judgment for the appellees, which the Supreme Court affirmed. 41 N. M. 288, 67 P. (2d) 505. The case comes here on appeal from the second judgment under § 237 of the Judicial Code, as amended, 28 U. S. C. § 344.

Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some of which are obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information, and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states.

Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the state.

That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U. S. 648; *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495. Cf. *Ware & Leland v. Mobile County*, 209 U. S. 405; *Engel v. O'Malley*, 219 U. S. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the busi-

ness. *Williams v. Fears*, 179 U. S. 270; *Ware & Leland v. Mobile County*, *supra*; *Browning v. Waycross*, 233 U. S. 16; *General Railway Signal Co. v. Virginia*, 246 U. S. 500, 510; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. We lay to one side the fact that appellants do not allege specifically that the contract stipulates that the advertisements shall be sent to subscribers out of the state, or is so framed that the compensation would not be earned if subscribers outside the state should cancel their subscriptions. We assume the point in appellants' favor and address ourselves to their argument that the present tax infringes the commerce clause because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine.

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way," *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259; *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 24; *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 696; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 225, 227, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Cleveland, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 439; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Western Union Tel. Co. v. Missouri ex rel. Gottlieb*, 190 U. S. 412; *Old Dominion S. Co. v. Virginia*, 198 U. S. 299, and if the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the state will be sustained, *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. Net earnings from interstate commerce are subject to income tax, *United States Glue Co. v. Oak Creek*, 247 U. S. 321, and, if the commerce is carried on by a corporation, a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within

the state by a fair method of apportionment. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113. *Cf. Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U. S. 271.

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, *Fargo v. Stevens, Michigan*, 121 U. S. 230; *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. R. Co. v. Texas, supra*; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, or added to, *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650, with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See *Philadelphia & S. M. S. S. Co. v. Pennsylvania, supra*, 326, 346; *State Freight Tax Case*, 15 Wall. 232, 280; *Bradley, J., dissenting in Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 235. *Cf. Pullman's Palace-Car Co. v. Pennsylvania, supra*. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 523.

It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, *State Freight Tax, supra*, or upon the freight earned by its carriage, *Fargo v. Michigan, supra*; *Philadelphia & S. M. S. S. Co. v. Pennsylvania, supra*, restricting the effect of State Tax on Railway Gross Receipts, 15 Wall. 284, with which compare *Miller, J., dissenting in that case at page 297*. Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379; *Maine v. Grand Trunk Railway, supra*; *Cudahy Packing Co. v. Minnesota, supra*; *United States Express Co. v. Minnesota*, 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, *Fargo v. Michigan, supra*; *Galveston, H. & S. A. R. Co. v. Texas, supra*; *Meyer v. Wells, Fargo & Co., supra*, with which compare *Wisconsin & M. R. Co. v. Powers, supra*. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in *Maine v. Grand Trunk Railway, supra*; *Ficklen v. Shelby County Taxing District, supra*; *American Manufacturing Company v. St. Louis*, 250 U. S. 459, or as a method of arriving at the fair measure of a tax substituted for local property

taxes, *Cudahy Packing Co. v. Minnesota*, *supra*; *United States Express Company v. Minnesota*, *supra*; *cf. Postal Telegraph Cable Co. v. Adams*, *supra*; see *McHenry v. Alford*, 168 U. S. 651, 670, 671, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431; *cf. Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. *Fargo v. Michigan*, *supra*. In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted.

In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intrastate and interstate. *American Manufacturing Co. v. St. Louis*, *supra*. The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods, manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold. *Ficklen v. Shelby County Taxing District*, *supra*, sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within for sellers without the state.

Viewed only as authority, *American Manufacturing Co. v. St. Louis*, *supra*, would seem decisive of the present case. But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. *Cf. Puget Sound Steve-*

doring Co. v. Tax Comm'n, 302 U. S. 90. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & Light Co. v. Pfost*, supra; *Federal Compress & W. Co. v. McLean*, 291 U. S. 17, or by its value. *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172; *Hope Natural Gas Co. v. Hall*, 274 U. S. 284. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. Unlike the measure of the tax sustained in *American Manufacturing Co. v. St. Louis*, supra, it does not embrace the purchase price (here the magazine subscription price) of the articles shipped in interstate commerce. So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought. See *Galveston, H. & S. A. R. Co. v. Texas*, supra. Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this Court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. See *Galveston, H. & S. A. R. Co. v. Texas*, supra.

Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co. v. Pfost*, supra; *Federal Compress & Warehouse Co. v. McLean*, supra; *Chassaniol v. Greenwood*, 291 U. S. 584, and that the value of the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellants' circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business.

But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed

elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent.

In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n*, *supra*, on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in *Crew Levick Co. v. Pennsylvania*, *supra*. In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. *Cf. American Manufacturing Co. v. St. Louis*, *supra*. In none of these respects is the present tax objectionable.

Affirmed.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER are of opinion that the judgment should be reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

#### NOTES

1. In *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. ed. 272, 59 Sup. Ct. 325 (1939) the question was whether a tax of the State of Washington for the privilege of engaging in business activities, at the rate of one-half of 1% of the "gross income of the business," was valid as applied to a domestic corporation whose only activities consisted of acting as the representative of local fruit growers' organizations in marketing in other states fruits grown in the taxing state. Sales of fruit were negotiated, and deliveries and collections were made in other states and in foreign countries, often by representatives at extra-state points. Some of the sales were of fruit in transit interstate and some in storage in various states. Compensation for the marketing service rendered was fixed at a stipulated price per box of fruit sold and delivered. The tax was measured by the entire volume of the interstate commerce in which the corporation par-

ticipated and was not apportioned to its activities within the state. Though nominally local, the tax in its practical operation was held to discriminate against interstate commerce by imposing upon it the risk of a multiple burden to which local commerce was not exposed. Said Mr. Justice Stone, speaking for the court: "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. \* \* \* Such a multiplication of state taxes, each measured by the volume of the commerce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove."

2. A trustee, domiciled in Indiana, of a testamentary trust created and administered under the laws of that state, instructed his Indiana broker to arrange for the sale at stated prices of securities forming part of the trust estate. Through the broker's New York correspondents the securities were sold on the New York Stock Exchange and the proceeds transmitted to the broker, who delivered them less his commission to the trustee. Indiana, under its Gross Income Tax Act, imposed a tax of 1% on the gross receipts of these sales. The Supreme Court, in an opinion written by Justice Frankfurter, invalidated the tax as a burden on interstate commerce. It said that a state could not justify what amounted to a "levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade." The extent of the economic burden of the tax was said to be irrelevant on the issue of constitutionality, since "an exaction by a state from interstate commerce falls not because of a proven increase in the cost of the product" but because "there is interference by a state with the freedom of interstate commerce." Justice Douglas, with whom Justice Murphy concurred, wrote a dissenting opinion. Justice Black dissented without opinion. Justice Rutledge concurred in the result but dissented from grounding the decision upon a foundation which he thought would not only outlaw properly apportioned taxes but also require striking down many other types of taxation theretofore sustained. *Freeman v. Hewitt*, 329 U. S. 249, 91 L. ed. 265, 67 Sup. Ct. 274 (1946). For adverse criticisms of the case as undermining the *Berwind-White* doctrine, discarding the "cumulative burdens" test formulated by Justice Stone in *Western Live Stock v. Bureau of Revenue* and applied in other cases, and as marking a retreat to the "conceptual approach" of the earlier cases, see Hartman, *State Taxation of Interstate Commerce* (1953), 200 *et seq.*; Dunham, *Gross Receipts Taxes on Interstate Transactions*, 47 Col. L. Rev. 211 (1947); Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?* 4 Vand. L. Rev. 496 (1951); Note, *Gross Receipts Taxes: A Change in Doctrine*, 56 Yale L. J. 898 (1947).

3. *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653, 92 L. ed. 1633, 68 Sup. Ct. 1260 (1948), while holding that a state tax on a carrier's gross receipts derived from transporting passengers between points within the state over a route a substantial part of which was in other states, unconstitutionally burdened interstate commerce by making it bear more than its "fair share of the cost of the local government whose protection it enjoys," said that such a tax would be permissible when apportioned to total mileage traversed within the state.

4. *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 93 L. ed. 1613, 69 Sup. Ct. 1264 (1949) involved the constitutionality of a state tax measured by gross receipts from the operation of a pipe line wholly within the state. The taxpayer, a foreign corporation, was engaged in transporting oil in its pipelines from lease tanks in oil fields in the state to loading racks adjacent to railroads, where it was loaded into tank cars for shipment outside the state. Four justices (Rutledge, Black, Douglas and Murphy) took the view that the statute was not

invalid under the commerce clause merely because it imposed a "direct" tax on the privilege of engaging in interstate commerce. Since the tax did not discriminate against interstate commerce, and since the nature of the subject made apportionment unnecessary, and there was no attempt to tax interstate activity carried on outside the state, they voted to sustain it. Justice Burton concurred solely on the ground that the tax was on the privilege of operating the pipeline in *intrastate* commerce. The four dissenting justices (Vinson, C. J., Reed, Frankfurter and Jackson) said that the shipment of the oil from the gathering point to the loading racks was interstate transportation, even though both points were in the same state, and that the commerce clause barred a state from taxing the privilege of doing interstate commerce, with or without fair apportionment, and even if not discriminatory. Recent cases have made it clear that a majority of the court support the proposition relied upon by the dissenting justices, *i. e.*, that no tax should be upheld which is construed to be upon the privilege of carrying on business exclusively interstate in character. See *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 Sup. Ct. 508 (1951); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 96 L. ed. 436, 72 Sup. Ct. 424 (1952); *Railway Express Agency v. Virginia*, 347 U. S. 359, 98 L. ed. 757, 74 Sup. Ct. 558 (1954) (holding that the tax under consideration was invalid as a privilege tax, although the highest state court had labeled it an *ad valorem* tax on intangible property; Justice Clark, with the concurrence of Chief Justice Warren and Justices Black and Douglas dissenting on the ground that the state court's characterization of the tax should be accepted).

## CHAPTER VII

### CONSTITUTIONAL LIMITATIONS: DUE PROCESS OF LAW AS TO PROCEDURE

#### DEN EX DEM. MURRAY v. HOBOKEN LAND & IMPROVE- MENT CO.

Supreme Court of the United States, 1856.  
18 How. 272, 15 L. ed. 372.

MR. JUSTICE CURTIS delivered the opinion of the Court.

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout—the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the District of New Jersey, on the 1st day of June, 1839—by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the Act of Congress of May 15, 1820, \* \* \*.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the Act of Congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838; that, on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of \$1,374,119 65/100, the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the Act of Congress as authorized it, is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an

exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta

had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. \* \* \* [The Court here gave an account of such proceedings in England.]

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such

warrant proceed to collect it. [Early state and federal legislation of this character is here referred to.]

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes, *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; *Hoke v. Henderson*, 4 Dev. N. C. Rep. 15; *Taylor v. Porter*, 4 Hill, 146; *Van Zandt v. Waddel*, 2 Yerger, 260; *State Bank v. Cooper*, Ibid. 599; *Jones' Heirs v. Perry*, 10 Ibid. 59; *Greene v. Briggs*, 1 Curtis, 311), yet, this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not. \* \* \*

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification;

yet the action of the executive power in issuing the warrant, pursuant to the Act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist. \* \* \* [The Act of 1820 was thus held to be constitutional.]

### NOTES

1. The "due process of law" and "law of the land" clauses which were inserted in early American state constitutions carried with them the usual English significance. In England the idea or principle had been borrowed from Magna Charta and referred originally to a method of procedure in criminal trials. Later it came to mean any procedure according to the ancient customary law, and after the Revolution of 1688 it was understood that such procedure might be changed by legislation of Parliament as well as by judicial decisions. The phrase was used to indicate that protection would be afforded against arbitrary and oppressive acts of the Crown and its officers, rather than against legislative authority. During the period antedating the Civil War, a few state courts applied these provisions of their constitutions in accordance with the broader view that they were guaranties against legislative action which offended fundamental principles of justice and reasonableness, such as retrospective laws, or laws which were unequal in their operation or transgressed the natural rights of the individual. But these few state precedents made but slight impression on American constitutional development during this period.

The Fifth Amendment to the Constitution provides that "No person shall \* \* \* be deprived of life, liberty, or property without due process of law." This applies to action by the federal government only. The same prohibition is extended to the states by the Fourteenth Amendment, which declares: "Nor shall any State deprive any person of life, liberty, or property without due process of law," and continues, "nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment thus links together the due process and equal protection clauses and the challenged state action is frequently contested in the same litigation on the ground that it offends both guaranties.

The due process requirement of the Fifth Amendment became effective upon ratification of that Amendment in 1791. However, save for the decision in *Dred Scott v. Sandford*, 19 How. 393, 15 L. ed. 691 (1857), invalidating the Missouri Compromise Act of 1820, no act of either the executive or legislative departments of the federal government was condemned prior to the Civil War. The principal case, in which the administrative procedure in question was upheld, was in fact the first in which the Supreme Court of the United States gave any serious consideration to the scope and meaning of due process. See, generally, Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 460 (1911), 1 *Selected Essays on Constitutional Law* (1938), 203; Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 Cal. L. Rev. 583 (1930); Grant, *The Natural Law Background of Due Process*, 31 Col. L. Rev. 56 (1931).

2. That due process of law does not necessarily involve judicial process is well-established. In *Ex parte Wall*, 107 U. S. 265, 289, 27 L. ed. 552, 2 Sup. Ct. 569 (1883), holding that an attorney may be disbarred by a court acting without a jury, Mr. Justice Bradley said: "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."

Summary proceedings for the collection of taxes are not violative of due process. *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. 324 (1890) (commitment of delinquent property owner); *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. 171 (1911) (forfeiture of title to land for non-payment of taxes); *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 75 L. ed. 1289, 51 Sup. Ct. 608 (1931) (summary proceeding for collection of unpaid income taxes does not deny due process if taxpayer is allowed an appeal to an administrative agency with a right to review its determination in the courts, or, in the alternative, may sue to recover amount paid).

3. Compare with the principal case *Ownbey v. Morgan*, 256 U. S. 94, 65 L. ed. 837, 41 Sup. Ct. 433, 17 A. L. R. 873 (1921), where the court sustained, on grounds of English usage and long and previously unchallenged recognition in some states, a harsh procedure whereby a court refused to permit a non-resident of the state, in a suit commenced against him by attachment of property in the state, to defend without first giving security in an amount equal to the plaintiff's claim, and gave judgment on default of such security, collectable only by sale of the property attached, although in the particular case the defendant claimed that the property attached was substantially all that he had and that in spite of every possible effort he was unable to obtain security. For another instance in which a statutory procedure was justified on the ground that it had "its roots in a distant past" and had been unchallenged during its long history, see *Coler v. Corn Exchange Bank*, 250 N. Y. 136, 164 N. E. 882 (1928), affirmed 280 U. S. 218, 74 L. ed. 378, 50 Sup. Ct. 94 (1930).

4. "A distinction has always been observed in the meaning of due process as affecting property rights, and as applying to procedure in the courts. In the former aspect the requirement is satisfied if no actual injury is inflicted and the substantial rights of the citizen are not infringed; the result rather than the means of reaching it is the important consideration. But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just." Mr. Justice Roberts, dissenting (with Justices Brandeis, Sutherland and Butler) in *Snyder v. Massachusetts*, 291 U. S. 97, 137, 78 L. ed. 674, 54 Sup. Ct. 330, 90 A. L. R. 575 (1934).

## DAVIDSON v. NEW ORLEANS.

Supreme Court of the United States, 1877.

96 U. S. 97, 24 L. ed. 616.

Error to the Supreme Court of the State of Louisiana.

MR. JUSTICE MILLER delivered the opinion of the Court [sustaining an assessment levied on certain real estate by the City of New Orleans, as authorized by state legislation, for the drainage of swamp lands].

\* \* \*

The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the federal government, it is found in the Fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offence; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several states, and in one shape or another have been the subject of judicial construction.

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States.

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year

of grace 1866, there is placed in the Constitution of the United States a declaration that "no state shall deprive any person of life, liberty, or property without due process of law," can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.

\* \* \*

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this Court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a state to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. This Court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, and regula-

tion of commerce, and other powers conferred on the federal government, or limitations imposed upon the states.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:—

That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. \* \* \*

This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution. \* \* \*

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force,—and some highly respectable authorities are cited to support the proposition,—that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this Court has cognizance, it is

Affirmed.

MR. JUSTICE BRADLEY gave a concurring opinion, in which he said: "I think it [the opinion of the Court] narrows the scope of inquiry as to what is due process of law more than it should do. \* \* \*

I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law; but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular state may require."

#### NOTES

1. The opinion in the principal case was the first in which dicta appeared to the effect that the substantive rights of life, liberty and property are protected against legislative deprivation by the due process clauses. In other words, the Supreme Court had apparently discovered that the guaranty of due process could be utilized as a constitutional restraint upon the substance of legislation as well as upon forms and modes of procedure. In this connection, the student should note the view expressed in Mr. Justice Bradley's concurring opinion. The case has been viewed as one of the stepping stones by which the scope of due process was gradually extended from protection of procedural rights to the protection of property rights against legislation challenged as arbitrary, capricious or unreasonable.

2. In *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. 663 (1884), sustaining an assessment on appellant's land of a portion of the cost of reclaiming swamp lands and affirming a judgment ordering sale of the land in foreclosure of the lien of the assessment, the Supreme Court by Mr. Justice Field, said: "Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes, (not dependent upon the extent of his business,) and, generally, specific taxes on things or persons or occupations. In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. \* \* \* In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assess-

ments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law. In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax-payer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. \* \* \*

### WUCHTER v. PIZZUTTI.

Supreme Court of the United States, 1928.

276 U. S. 13, 72 L. ed. 446, 48 Sup. Ct. 259, 57 A. L. R. 1230.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court. \* \* \*

Pizzutti was driving a team of horses attached to a wagon on a public highway in New Jersey. Wuchter was a resident of Pennsylvania, who was following the wagon with his automobile. Wuchter drove his car so as to crash into the rear of the wagon, damaging it, and injuring Pizzutti and his horses. Pizzutti instituted a suit against Wuchter in the Supreme Court of New Jersey. Wuchter was served with process under the provisions of the act known as chapter 232 of the Laws of 1924 (P. L. 1924, p. 517) by leaving process with the secretary of state. Wuchter interposed no defense. A judgment interlocutory was taken against him and a writ of inquiry of damages was issued. Although the statute did not require it, notice of its proposed execution was actually served personally on Wuchter in Pennsylvania. Wuchter did not appear. A final judgment was entered. Wuchter then appealed to the court below, contending that the act under which the process was served upon him was unconstitutional, because it deprived him of his property without due process of law, in contravention of section 1 of the Fourteenth Amendment to the federal Constitution.

Section 1 of the act complained of, under which the process was served in this case, was as follows:

"From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to nonresident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the secretary of state of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of

any accident or collision occurring within the state in which a motor vehicle operated by such chauffeur, operator, or such motor vehicle is involved." \* \* \*

By the general state motor law, as amended by chapter 211, Laws of 1924, provision is made for the registration and license of automobiles owned by nonresidents who use the highways of the state, P. L. 1924, § 9, par. 4, p. 451. They are required to agree that original process against the owner made by leaving it in the office of the secretary of state shall have the same effect as if served on the owner within the state, and the statute provides that the commissioner of motor vehicles shall notify the owner of such motor car by letter directed to him at the post office address stated in his application for registration and license already filed with the commissioner.

The act first above referred to, No. 232, under which process in this case was served, applies to the owners of automobiles who are not licensed, but who come into the state and use the highways of the state without registration, and is not to be confused with the license act or its provisions.

It is settled by our decisions that a state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. *Hendrick v. Maryland*, 235 U. S. 610, 622. We have further held that, in advance of the operation of a motor vehicle on its highways by a nonresident, a state may require him to take out a license and to appoint one of its officials as his agent, on whom process may be served in suits growing out of accidents in such operation. This was under the license act of New Jersey, last above referred to, and not No. 232. *Kane v. New Jersey*, 242 U. S. 160, 167. We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by nonresidents, to declare, without exacting a license, that the use of the highway by the nonresident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. *Hess v. Pawloski*, 274 U. S. 352.

The question made in the present case is whether a statute, making the secretary of state the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the secretary will be communicated to the nonresident defendant who is sued. Section 232 of the Laws of 1924 makes no such requirement and we have not been shown any provision in any applicable law of the State of New Jersey requiring such communication. We think that a law with the effect of this one should make a reasonable provision for such probable communication. We quite agree, and, indeed, have so held in the *Pawloski* Case, that the act of a nonresident in using the highways of another state may properly be declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced accept-

ance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the secretary of state or some officer of the state, without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a nonresident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (*Heinemann v. Pier*, 110 Wis. 185), or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law. The Massachusetts statute, considered in *Hess v. Pawloski*, really made necessary actual personal service to be evidenced by the written admission of the defendant. In *Kane v. New Jersey*, the service provided for by statute was by mail to the necessarily known registered address of the licensed defendant.

In determining the reasonableness of provision for service we should consider the situation of both parties. The person injured must find out to whom the offending automobile belongs. This may be a difficult task. It is easy when the owner of the automobile is present after the accident. That is provided for in the second section of this act by apprehending him or his operator. But the vehicle may be operated by some one who having committed the injury successfully escapes capture or identification. In such a case, the person injured must be left without a remedy by suit at law, as every one must be who does not know or cannot discover the person who injured him. The burden is necessarily on him to investigate and learn. In finding out who it was, and whether the person is of such financial responsibility as to warrant a suit, he almost necessarily will secure knowledge of his post office address or his place of residence, and thereby be enabled to point out how notice may be communicated to him. With this information at hand the state may properly authorize service to be made on one of its own officials, if it also requires that notice of that service shall be communicated to the person sued. Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant.

The cases, in which statutes have been upheld providing that non-resident corporations may properly be served by leaving a summons with a state official, where the corporation has not indicated a resident agent

to be served, are not especially applicable to the present statute. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, 243 U. S. 93; *Simon v. Southern Ry. Co.*, 236 U. S. 115; *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8. Such corporations may properly be required to accept service through a public officer as a condition of their doing business in the state. Their knowledge of the statutory requirement may perhaps prompt frequent inquiry as to suits against them, of their appointed agent or at the office of the public official to be served, but it could hardly be fair or reasonable to require a nonresident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the secretary of state to learn whether he has been sued. Even in cases of nonresident corporations, it has been held that a statute directing service upon them by leaving process with a state official is void if it contains no provision requiring the official, upon whom the service may be made, to give the foreign corporations notice that suit has been brought and citation served. \* \* \*

In *McDonald v. Mabec*, 243 U. S. 90, 91, a person domiciled in Texas left the state to make his home in another state. An action for money was begun by publication in a newspaper after his departure, and a judgment recovered and sustained by the state Supreme Court was held void by this Court. This Court said:

"The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. \* \* \* No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice. \* \* \* And in states bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." See, also, *Roller v. Holly*, 176 U. S. 398.

These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.

But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it. \* \* \* Judgment reversed.

[JUSTICES BRANDEIS and HOLMES dissented, chiefly on the ground that notice having actually been given, the defendant should not be heard to complain of a defect in the statute which had not operated to his

prejudice; and JUSTICE STONE on the ground that it should be left to the state court to decide whether the statute should be construed as impliedly requiring notice to be given a defendant. Otherwise these justices concurred in the principles announced.]

## NOTE

1. No legislative act, judicial process or administrative proceeding can meet the requirements of due process of law if it seeks to extend its control or influence beyond the territorial limits of the government on whose behalf the action is taken. To have due process in a judicial proceeding the court undertaking to adjudicate the controversy must have jurisdiction of the subject-matter of the action and of the persons whose rights and interests are to be affected by any judgment or decree the court may render. *Pennoy v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877). Cf. *Milliken v. Meyer*, 311 U. S. 457, 85 L. ed. 278, 61 Sup. Ct. 339, 132 A. L. R. 1357 (1940). Jurisdiction in an action instituted to determine the personal liability of a defendant requires some form of service of process upon him which will reasonably insure that he receive the notice and opportunity to be heard to which he is entitled. The subject of jurisdiction in judicial proceedings is not dealt with further in this case-book.

For discussion of the problems raised in the principal case, see Scott, Jurisdiction over Non-Resident Motorists, 39 Harv. L. Rev. 563 (1926); Culp, Process in Actions Against Non-Resident Motorists, 32 Mich. L. Rev. 325 (1934).

## BRINKERHOFF-FARIS TRUST &amp; SAVINGS CO. v. HILL.

Supreme Court of the United States, 1930.

281 U. S. 673, 74 L. ed. 1107, 50 Sup. Ct. 451.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1928, the Brinkerhoff-Faris Trust & Savings Company, acting as trustee for its shareholders, brought this suit in a Missouri court against the Treasurer of Henry County, Missouri, to enjoin him from collecting or attempting to collect a certain part of the taxes assessed against them for the year 1927 on the shares of its stock; and, pending decision in this suit, to restrain the prosecution of an action already brought by him against the plaintiff for that purpose.

The bill alleged that the township assessor had intentionally and systematically discriminated against the shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent or less of their value. It asserted that, to the extent of 25 per cent, the assessments were void because such discrimination violated the equal protection clause of the Fourteenth Amendment. And it recited that the plaintiff had tendered, and was continuing to tender, payment of the 75 per cent of the taxes assessed, which amount it conceded was due. As grounds for equity jurisdiction, the bill charged that relief could not be had at law, either by way of defense in the pending action brought by the Treasurer or by paying the tax in full under pro-

test and suing for a refund of 25 per cent thereof; and that no administrative remedy for the relief sought was, or ever had been, provided by law either by appeal or otherwise to or from the County Board of Equalization or the State Board of Equalization.

The defendant's answer denied all the allegations of discrimination and further opposed relief in equity on the grounds that the plaintiff had not pursued remedies before the County or State Board of Equalization pursuant to Articles 3 and 5 of Chapter 119 of the Missouri Revised Statutes of 1919; and that the plaintiff was guilty of laches in not so doing. The trial court refused the injunction and dismissed the bill, without opinion or findings of fact.

The Supreme Court of Missouri held, on appeal, that relief from the alleged discriminatory assessment could not be had in any suit at law; that this bill in equity was the appropriate and only remedy, unless relief could have been had by timely application to some administrative board; and that neither of the boards of equalization was charged with the power and duty to grant such relief. But, without passing definitely upon the question of discrimination, it concluded that if the plaintiff had "at any time before the tax books were delivered to the collector, filed complaint before the State Tax Commission, that body, in the proper exercise of its jurisdiction, would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by the statute is adequate, certain, and complete." Compare *First National Bank of Greeley v. Weld County*, 264 U. S. 450. The court held, therefore, that, because plaintiff had this adequate legal remedy, it was not entitled to equitable relief, and because plaintiff had not complained to the Tax Commission, "it was clearly guilty of laches in not so doing." On these grounds, the Supreme Court affirmed the judgment of the trial court. 323 Mo. 180.

The powers and duties of the State Tax Commission are prescribed by Article 4 of Chapter 119 of the Revised Statutes of 1919. Six years before this suit was begun, those provisions had been construed by the Supreme Court of Missouri in *Laclede Land & Improvement Co. v. State Tax Commission*, 295 Mo. 298. There, the court had been required to determine whether the Commission had power to grant relief of the character here sought. The Commission had refused, on the ground of lack of power, an application for relief from discrimination similar to that here alleged. The Laclede Company petitioned for a mandamus to compel the Commission to hear its complaint. The Supreme Court denied the petition, saying that it was "preposterous" and "unthinkable" that the statute conferred such power on the Commission; and that if the statute were thus construed, it would violate section 10 of article 10

of the constitution of Missouri. That decision was thereafter consistently acted upon by the Commission; and it was followed by the Supreme Court itself in later cases. [Citations omitted.]

No one doubted the authority of the Laclede case until it was expressly overruled in the case at bar. While the defendant's answer asserted that the plaintiff had not availed itself of the administrative remedies under Articles 3 and 5 of Chapter 119 by application to the boards of equalization and was guilty of laches in not so doing (contentions which the state court held to be unsound), the answer significantly omitted any contention that there had been a remedy by application to the State Tax Commission, whose powers are dealt with in the intervening Article 4. The possibility of relief before the Tax Commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the Tax Commission could not be made after the tax books were delivered to the collector; and this had been done about October 1, 1927.

The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of Article 4 of Chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the Commission, the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313. The petition was denied without opinion. This Court granted certiorari, 280 U. S. 550. We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the Federal Constitution to equality of treatment. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441. If the allegations of the complaint could be established, the Federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the State. *Second Employers' Liability Cases*, 223 U. S. 1, 55-57.

Under the settled law of the State, that remedy was the only one available. That a bill in equity is appropriate and that the court has power to grant relief, even under the new construction of the statute

dealing with the Tax Commission, is not questioned. And it is held by the state court in this case that no other judicial remedy is open to the plaintiff and that no administrative remedy, other than that before the State Tax Commission, has been provided. But, after the decision in the Laclede case, it would have been entirely futile for the plaintiff to apply to the Commission. That body had persistently refused to entertain such applications; and the Supreme Court of the State had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the Tax Commission could not, because of the rule of the Laclede case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, at no time did the State provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent. *Montana National Bank v. Yellowstone County*, 276 U. S. 499, 505.

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

Second. If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. *Ettor v. Tacoma*, 228 U. S. 148. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (*First National Bank of Greeley v. Weld County*, 264 U. S. 450) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475-6. \* \* \*

Reversed.

MR. JUSTICE McREYNOLDS did not hear the argument and took no part in the decision of this case.

#### NOTES

1. "The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive." *Mr. Justice White in Castillo v. McConnico*, 168 U.S. 674, 683, 42 L. ed. 622, 18 Sup. Ct. 229 (1898).

Compare with the above the following dicta: "Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be

impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights." Mr. Justice Holmes in *Chicago Life Ins. Co. v. Cherry*, 244 U. S. 25, 30, 61 L. ed. 966, 37 Sup. Ct. 492 (1917).

2. It is the general rule that a taxpayer who fails to take advantage of the statutory opportunity afforded him for a hearing cannot thereafter object to the legality of an assessment. Nor is it essential to due process of law that a taxpayer be given notice and hearing before the value of his property is originally assessed, if he is granted the right to be heard before the valuation is finally determined. *Chicago, M., St. P. & P. R. Co. v. Risty*, 276 U. S. 567, 72 L. ed. 703, 48 Sup. Ct. 396 (1928); *McGregor v. Hogan*, 263 U. S. 234, 68 L. ed. 282, 44 Sup. Ct. 50 (1923); *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. 83 (1895). See also *Stason, Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies*, 28 Mich. L. Rev. 637 (1930).

### WONG WING v. UNITED STATES.

Supreme Court of the United States, 1896.  
163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. 977.

On July 15, 1892, Wong Wing, Lee Poy, Lee Yon Tong and Chan Wah Dong were brought before John Graves, a commissioner of the Circuit Court of the United States for the Eastern District of Michigan, by virtue of a warrant issued upon the complaint of T. E. McDonough, deputy collector of customs, upon a charge of being Chinese persons unlawfully within the United States and not entitled to remain within the same. The commissioner found that said persons were unlawfully within the United States and not entitled to remain within the same, and he adjudged that they be imprisoned at hard labor at and in the Detroit house of correction for a period of sixty days from and including the day of commitment, and that at the expiration of said time they be removed from the United States to China.

A writ of habeas corpus was sued out of the Circuit Court of the United States, directed to Joseph Nicholson, superintendent of the Detroit house of correction, alleging that said persons were by him unlawfully detained; the superintendent made a return setting up the action of the commissioner; and, after argument, the writ of habeas corpus was discharged, and the prisoners were remanded to the custody of said Nicholson, to serve out their original sentence. From this decision an appeal was taken to this Court.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the Court. \* \* \*

The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge or commissioner of the United States, without a trial by jury. In other words, we have to consider the meaning and validity of the fourth section of the act of

May 5, 1892, in the following words: "That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be and remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offence, punishable by fine or imprisonment, if such offence were to be established by a judicial trial.

But the evident meaning of the section in question, and no other is claimed for it by the counsel for the Government, is that the detention provided for is an imprisonment at hard labor, which is to be undergone before the sentence of deportation is to be carried into effect, and that such imprisonment is to be adjudged against the accused by a justice, judge or commissioner, upon a summary hearing. Thus construed, the fourth section comes before this court for the first time for consideration as to its validity. \* \* \*

Our views, upon the question thus specifically pressed upon our attention, may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by

a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents. \* \* \*

Our conclusion is that the commissioner, in sentencing the appellants to imprisonment at hard labor at and in the Detroit house of correction, acted without jurisdiction, and that the Circuit Court erred in not discharging the prisoners from such imprisonment, without prejudice to their detention according to the law for deportation.

[Mr. JUSTICE FIELD concurred in part and dissented in part.]

#### NOTE

1. An offense punishable by imprisonment at hard labor is an infamous crime within the meaning of the Fifth Amendment, and the trial of a defendant in a federal court for such a crime without indictment by a grand jury violates the guaranty of that Amendment. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. 935 (1885). It is such if the crime is punishable by imprisonment in a state prison or penitentiary, with or without hard labor. *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. 777 (1886). The nature of the crime is still the same if the punishment is by imprisonment at hard labor in a workhouse. *United States v. Moreland*, 258 U. S. 433, 66 L. ed. 700, 42 Sup. Ct. 368, 24 A. L. R. 992 (1922).

#### OCEANIC STEAM NAVIGATION CO. v. STRANAHAN.

Supreme Court of the United States, 1909.  
214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. 671.

Mr. JUSTICE WHITE delivered the opinion of the Court.

The steamship company sought the recovery of money paid to the collector of customs of the port of New York which was exacted by that official under an order of the Secretary of Commerce and Labor. \* \* \*

Both the Secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions which were made. The only question, therefore, is whether the power conferred upon the named officials was consistent with the Constitution. The provision under which the officials acted is § 9 of the act of March 3, 1903, entitled, "An Act to regulate the immigration of aliens into the United States." c. 1012, 32 Stat. 1213. \* \* \*

Section 9, \* \* \* is as follows:

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease; and it shall appear to the satisfaction of the Secretary of the Treasury (Secretary of Commerce and Labor) that any alien so brought to the United States was

afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted." \* \* \*

We think it is also certain that the power thus lodged in the Secretary of Commerce and Labor was intended to be exclusive, and that its exertion was authorized as the result of the probative force attributed to the official medical examination for which the statute provides, and that the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement. \* \* \*

1. It is insisted that, however complete may be the power of Congress to legislate concerning the exclusion of aliens and to entrust the enforcement of legislation of that character to administrative officers, nevertheless the particular legislation here in question is repugnant to the Constitution because it defines a criminal offense and authorizes a purely administrative official to determine whether the defined crime has been committed, and, if so, to inflict punishment. Conclusive support for the legal proposition upon which this contention must rest, it is insisted, results from the ruling in *Wong Wing v. United States*, 163 U. S. 228. \* \* \*

But in so far as the case of *Wong Wing* held that the trial and punishment for an infamous offense was not an administrative but a judicial function, it is wholly inapposite to this case, since, on the face of the section which authorizes the Secretary of Commerce and Labor to impose the exaction which is complained of, it is apparent that it does not purport to define and punish an infamous crime, or indeed any criminal offense whatever. \* \* \* The sole purpose of § 9 was to impose a penalty, based upon the medical examination for which the statute provided, thus tending, by the avoidance of controversy and delay, to secure the efficient performance by the steamship company of the duty to examine in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress to exclude from the United States aliens afflicted with loathsome or dangerous contagious diseases as defined in the act. The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion. *Hepner v. United States*, 213 U. S. 103.

2. But it is argued that even though it be conceded that Congress may in some cases impose penalties for the violation of a statutory duty and provide for their enforcement by civil suit instead of by criminal prosecution, as held in *Hepner v. United States*, nevertheless that doctrine does not warrant the conclusion that a penalty may be authorized, and its collection committed to an administrative officer without the necessity of resorting to the judicial power. In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all other departments of the government, disregards many previous adjudications of this Court and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question. \* \* \*

3. It is urged that the fines which constituted the exactions were repugnant to the Fifth Amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous notice, and in all cases without any adequate notice or opportunity to defend. Stated in the briefest form, the findings below show that on the arrival of a vessel, if the examining medical officers discovered that an immigrant was afflicted with one of the prohibited diseases, the owner of the vessel was notified of the fact, and, indeed, that the steamship company had at the place where the examination was made what is known as a landing agent, whose business it was to keep informed as to the result of medical examinations, and to know when an immigrant was detained by the medical officers because afflicted with a prohibited disease. \* \* \*

It is not denied that there was full power in Congress to provide for the examination of the alien by medical officers and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests upon a distinction without a difference. It disregards the purpose which, as we have already pointed out, Congress had in view in the enactment of the provision, that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady, not only to other immigrant passengers, but ultimately it might be to the entire people of the United States, a danger arising from the possible admission of aliens who might contract the contagion during the voyage and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that the time had not elapsed for the manifestation of its presence. In effect, all the contentions pressed in argument concerning

the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form and not substance may be made by the courts the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty which there was lawful authority to impose. \* \* \* Affirmed.

### UNITED STATES v. JU TOY.

Supreme Court of the United States, 1905.  
198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. 644.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the Steamship Doric for return to China, presented a petition for habeas corpus to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued and the United States made return, and answered showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive and that no abuse of authority was shown. These were denied, and the District Court decided seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

[(1) Should a District Court issue a writ of habeas corpus in an exclusion case where the detention is claimed to be unlawful solely because of alleged error of the administrative officers in deciding the disputed question of birth in and consequent citizenship of the United States?

(2) If yes, should the District Court give a new or further hearing upon the evidence offered? or,

(3) Should the District Court "treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. \* \* \*

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in *United States v. Sing Tuck*, 194 U. S. 161, 167, that the act of August 18, 1894, c. 301, § 1, 28 Stat. 372, 390, purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U. S. 86, 97, it was said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also *Turner v. Williams*, 194 U. S. 279, 290, 291; *Chin Bak Kan v. United States*, 186 U. S. 193, 200. In *Fok Young Yo v. United States*, 185 U. S. 296, 304, 305, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in *Lem Moon Sing v. United States*, 158 U. S. 538, where the petitioner for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases and the language which we have quoted is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as

when it is domicil and the belonging to a class excepted from the exclusion acts. *United States v. Sing Tuck*, 194 U. S. 161, 167; *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547. \* \* \*

The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. United States*, 142 U. S. 651, 660, and in *Fong Yue Ting v. United States*, 149 U. S. 698, 713, before the authorities to which we already have referred. \* \* \*

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case. It will be so certified.

[MR. JUSTICE BREWER delivered a dissenting opinion, in which MR. JUSTICE PECKHAM concurred. MR. JUSTICE DAY also dissented.]

#### NOTE

1. Since authority to exclude from the country depends on alienage, the holding of the *Ju Toy* case makes it possible for an administrative agency, by passing finally on the fact of citizenship, to determine its own jurisdiction. Courts have no power to interfere unless there was either a denial of a fair hearing, *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. 201 (1908), or the finding was not supported by evidence, *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. 33 (1902), or there was an application of an erroneous rule of law, *Gegiow v. Uhl*, 239 U. S. 3, 60 L. ed. 114, 36 Sup. Ct. 2 (1915).

In *Ng Fung Ho v. White*, 259 U. S. 276, 66 L. ed. 938, 42 Sup. Ct. 492 (1922) the question was whether the claim of citizenship by a resident, supported by evidence both before the immigration officer and upon petition for a writ of habeas corpus, which is sufficient, if believed, to justify a finding of citizenship, entitles him to a judicial trial of this claim. In answering this question in the affirmative the court pointed out that "to deport one who so claims to be a citizen obviously deprives him of liberty" and "may result also in loss of both property and life; or of all that makes life worth living." The court continued: "Against the danger of such deprivation, without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court." While deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process of law which may be corrected on habeas corpus, such want of due process is not established by showing merely that the decision is erroneous, *Chin Yow v. United States*, supra, or that incompetent evidence was received and considered. *United States ex rel. Tisi v. Tod*, 264 U. S. 131, 68

L. ed. 590, 44 Sup. Ct. 260 (1924). See, generally, Van Vleck, *The Administrative Control of Aliens* (1932); Konvitz, *The Alien and the Asiatic in American Law* (1946).

### LAWTON v. STEELE.

Supreme Court of the United States, 1894.  
152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. 499.

[In the Supreme Court of the county of Jefferson, New York, the plaintiff sued to recover the value of fifteen fish nets belonging to him, destroyed by defendant Steele. The facts were undisputed, that Steele acted in his official capacity as a game and fish protector, that he found most of the nets set to catch fish and the rest on the shore having recently been used for the same purpose. The defendant justified under a game and fish statute which authorized the summary destruction of nets used in illegal fishing. The plaintiff replied that if the statute purported to justify Steele's action it was unconstitutional. On a verdict of \$216, plaintiff was given judgment. On appeal to the General Term this judgment was reversed, and upon further appeal the Court of Appeals ordered a judgment for the defendant. Now on writ of error:]

MR. JUSTICE BROWN delivered the opinion of the Court. \* \* \*

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed." \* \* \* The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. \* \* \*

In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for

illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. \* \* \*

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. \* \* \*

The value of the nets in question was but \$15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation. \* \* \*

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. \* \* \*

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. \* \* \*

The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People v. West*, 106 N. Y. 293), and in such case the legislature may annex to the prohibited

act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance. \* \* \*

Judgment Affirmed.

[CHIEF JUSTICE FULLER delivered a dissenting opinion, concurred in by JUSTICES FIELD and BREWER.]

## NOTES

1. Where statutes authorizing the summary seizure and destruction of property used in violation of law or dangerous to the public health and safety fail to provide for a preliminary hearing, due process requires that the owner be afforded a subsequent judicial determination of the legality of the seizure and destruction, as well as compensation for his loss, either from the public or the officials responsible therefor, in the event such action was illegal. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. 101, 15 Ann. Cas. 276 (1908). Statutes in many states have provided for compensation to the owners of property thus destroyed. See the annotations in 12 A. L. R. 734 (1921), and 67 A. L. R. 208 (1930).

2. The property rights of an innocent owner may be forfeited if his property is used in violating the law by a person who has been entrusted by the owner with possession thereof. This principle has been applied to sustain statutes providing for forfeitures of vehicles, vessels, boats and other property used as a means of violating statutes prohibiting the manufacture and sale of intoxicating liquors and of the federal revenue laws. See *J. W. Goldsmith, Jr. v. Grant Co. v. United States*, 254 U. S. 505, 65 L. ed. 376, 41 Sup. Ct. 189 (1921), where the court said: "In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. \* \* \* It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental."

3. It has been previously noted that due process of law does not require judicial process in administrative procedure. The power of legislative bodies to delegate authority to administrative officers and agencies to find facts and apply the law to these facts has long been recognized. Finality may even be given to certain administrative findings of fact. However, administrative determinations are held to violate due process when they exceed the statutory authority of the agency, or are not supported by evidence, or the agency has not afforded the litigant due notice and an opportunity to be heard, or has not been fair and impartial in its investigatory procedure. In *Morgan v. United States*, 304 U. S. 1, 14-15, 82 L. ed. 1129, 58 Sup. Ct. 773 (1938), Mr. Chief Justice Hughes, speaking for the court, said: "The vast expansion in this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process."

The Federal Administrative Procedure Act, enacted in 1946 with the objective of improving the administration of justice by prescribing fair administrative procedure, establishes standards of procedure in federal agencies and also

standards of judicial review, except where statutes preclude judicial review or agency action is by law committed to agency discretion. Since constitutional problems involved in administrative adjudication and enforcement are dealt with in courses in Administrative Law, this case-book omits further case materials in this field.

### HURTADO v. CALIFORNIA.

Supreme Court of the United States, 1884.  
110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. 111.

[The Constitution of California of 1879 provided: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law." A statute of 1880 provided that when a committing magistrate upon giving an arrested person a preliminary examination should find sufficient cause to believe the person guilty of a public offense he should commit him to custody or bail, as the case might be, not for examination before a grand jury as theretofore but to stand trial, and the statute declared, "it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense." By this method of accusation Hurtado was prosecuted and convicted on a charge of murder and given a death sentence. The Supreme Court of California affirmed the judgment and this writ of error was taken.]

MR. JUSTICE MATTHEWS delivered the opinion of the Court. \* \* \*

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States, which is in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the states respectively to dispense with in the administration of criminal law. \* \* \*

It is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which,

venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in *Jones v. Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." \* \* \*

[After commenting at length upon Coke's discussion of "the law of the land" clause of Magna Charta, referred to by Shaw, C. J., the opinion continues:]

Mr. Reeve, in 2 *History of Eng. Law*, 43 translates the phrase, *nisi per legale iudicium parium suorum vel per legem terre*, "but by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 *Com.* 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

This accords with what is said in *Westervelt v. Gregg*, 12 N. Y. 202, by Denio, J., p. 212: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank*

of *Columbia v. Okely*, 4 Wheat. 235-244: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." \* \* \*

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice,—*sum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep. 115, 118 a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice."

\* \* \*

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself." [It then immediately adds:] "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important Amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The con-

clusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

\* \* \*

But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society;" and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

\* \* \*

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. \* \* \*

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments. \* \* \*

For these reasons, finding no error therein, the judgment of the Supreme Court of California is

Affirmed.

[Mr. JUSTICE HARLAN delivered a dissenting opinion.]

#### NOTES

1. The provision of the national Constitution (Art. III, § 2, cl. 3) that in the federal courts "the trial of all crimes, except in cases of impeachment, shall be by jury" has been interpreted to require the common-law number of twelve jurors and conviction only by unanimous verdict. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. 620 (1898). The right of trial by jury in criminal prosecutions, guaranteed by the Sixth Amendment, is not a privilege or immunity of national citizenship, and a provision of the Utah Constitution for a jury of eight persons in all criminal trials other than for capital offenses (instead of the twelve required by the court's interpretation of the Sixth Amendment) is not a violation of the due process of law guaranty of the Fourteenth Amendment, the court saying that "trial by jury has never been affirmed to be a necessary requisite of due process of law." *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. 448 (1900) (criminal case). The right of trial by jury in suits at common law, guaranteed by the Seventh Amendment, is not a privilege or immunity of national citizenship, nor is it protected by the due process clause of the Fourteenth Amendment against violation by the states. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678 (1876) (civil suit). A trial for felony in the federal courts may be without a jury but "the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Patton v. United States*, 281 U. S. 276, 74 L. ed. 854, 50 Sup. Ct. 253, 70 A. L. R. 263 (1930).

2. "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding

and the character of the rights which may be affected by it." *Dohany v. Rogers*, 281 U. S. 362, 369, 74 L. ed. 904, 50 Sup. Ct. 299, 68 A. L. R. 434 (1930).

3. In *Galloway v. United States*, 319 U. S. 372, 87 L. ed. 1458, 63 Sup. Ct. 1077 (1943) the Supreme Court, reaffirming earlier decisions, held (Justices Black, Douglas and Murphy dissenting) that the guaranty of a jury trial in suits at common law, given by the Seventh Amendment, does not deprive the federal courts of the power in a jury case to direct a verdict upon the ground of the insufficiency of the evidence.

### EILENBECKER v. PLYMOUTH COUNTY.

Supreme Court of the United States, 1890.

134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. 424.

[The statute involved in the case was "Whoever shall erect or establish or continue or use any building, erection or place for [the manufacture or sale of intoxicating liquor] shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding \$1000 and costs of prosecution, and stand committed until the fine and costs are paid. \* \* \* Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity, to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceeding shall be punished as for contempt, by fine of not less than five hundred nor more than one thousand dollars or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court."]

Appeals from the trial court in the six cases stated in the opinion below being taken to the Supreme Court of Iowa were there treated as one, the judgment of the trial court affirmed and this writ of error taken.]

MR. JUSTICE MILLER delivered the opinion of the Court. \* \* \*

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that state. This judgment imposed a fine of five hundred dollars and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months, but they were to be released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined

from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them. \* \* \*

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power. \* \* \*

The [federal] statute, now embodied in § 725 of the Revised Statutes, reads as follows: "The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts."

It will thus be seen that even in the act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish

in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. \* \* \*

So far from any statute on this subject limiting the power of the courts of Iowa, the act of the legislature of that state, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit. \* \* \*

We think it was within the power of the court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is affirmed.

#### NOTES

1. Several sections of the National Prohibition Act, repealed by the Twenty-first Amendment, were similar to the Iowa legislation above, except that the action to obtain an injunction might be brought only by an official prosecutor.

Neither in the proceeding to obtain an injunction nor in the contempt proceeding was provision made for jury trial. The act declared any building, boat, vehicle, etc. in which liquor was manufactured, kept, or sold a nuisance and also that any person who should, with intent to effect a sale, carry around on his person any prohibited liquor or who should travel to solicit orders for sale of such liquor was "guilty of a nuisance" and might be enjoined permanently and punished summarily for violation of the injunction. By other sections of the statute these acts were made criminal offenses to be prosecuted by the usual criminal procedure.

2. On topics related to the issues of the principal case see Ralston, *Governments by Injunction*, 5 *Corn. L. Q.* 424 (1920); Golding, *Constitutional Question Involved in the Abatement and Injunction Sections of the National Prohibition Act*, 19 *Ill. L. Rev.* 71 (1924); Ballantine, *Injunctions; Extension of Criminal Equity; Criminal Syndicalism Punishable as Contempt of Court*, 13 *Cal. L. Rev.* 63 (1924), 2 *Selected Essays on Constitutional Law* (1938) 1331.

### POWELL v. ALABAMA.

Supreme Court of the United States, 1932.

287 U. S. 45, 77 L. ed. 158, 53 Sup. Ct. 55, 84 A. L. R. 527.

Certiorari to the Supreme Court of Alabama to review judgments affirming sentences of death based upon convictions of several defendants.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were argued together and submitted for decision as one case.

The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931, [on a freight train passing through the state, upon which the defendants, the girls and others were riding]. The indictment was returned in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of not guilty. \* \* \*

There was a severance upon the request of the state, and the defendants were tried in three several groups. \* \* \* Each of the three trials was completed within a single day. Under the Alabama statute the punishment for rape is to be fixed by the jury, and in its discretion may be from ten years imprisonment to death. The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court. Chief Justice Anderson thought the defendants had not been accorded a fair trial and strongly dissented. 224 Ala. 524; *id.* 531; *id.* 540; 141 So. 215, 195, 201.

In this Court the judgments are assailed upon the grounds that the defendants, and each of them, were denied due process of law \* \* \* in contravention of the Fourteenth Amendment, specifically as follows:

(1) they were not given a fair, impartial and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial. \* \* \*

The only one of the assignments which we shall consider is the second, in respect of the denial of counsel. \* \* \*

First. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases, judging from the number and activity of counsel that appeared immediately or shortly after their conviction." 224 Ala., at pp. 554-555; 141 So. 201.

It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. \* \* \* [On the morning of the trial, six days after the arraignment, the trial judge in a "casual fashion" appointed Mr. Moody, of the local bar, as counsel, and Mr. Roddy, a nonresident lawyer, volunteered to assist. These two conducted the defense in the trials.]

It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." \* \* \* The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court

could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: "\* \* \* the record indicates that the appearance was rather pro forma than zealous and active. \* \* \*" Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. \* \* \*

Second. The Constitution of Alabama provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel; and a state statute requires the court in a capital case, where the defendant is unable to employ counsel, to appoint counsel for him. The state Supreme Court held that these provisions had not been infringed, and with that holding we are powerless to interfere. The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution.

If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process. Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. After the revolution of 1688, the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when by act of Parliament the full right was granted in respect of felonies generally. 1 Cooley's Const. Lim., 8th ed., 698, et seq., and notes.

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers. As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. "For upon what face of reason," he says, "can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" 4 Blackstone 355. One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner, 1 Cooley's Const. Lim., supra. But how can

a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional. \* \* \*

[Here the opinion quotes from the first constitutions of several states and from statutes enacted either in the colonial or statehood periods to show that quite early in twelve of the original thirteen states] the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes. \* \* \*

One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. *Lowe v. Kansas*, 163 U. S. 81, 85. Compare *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-277; *Twining v. New Jersey*, 211 U. S. 78, 100-101. Plainly, as appears from the foregoing, this test, as thus qualified, has not been met in the present case.

We do not overlook the case of *Hurtado v. California*, 110 U. S. 516, where this Court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder. In support of that conclusion the Court (pp. 534-535) referred to the fact that the Fifth Amendment, in addition to containing the due process of law clause, provides in explicit terms that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, \* \* \*", and said that since no part of this important amendment could be regarded as superfluous, the obvious inference is that in the sense of the Constitution due process of law was not intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case; and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the states, was to be interpreted as having been used in the same sense and with no greater extent; and that if it had been the purpose of that Amendment to perpetuate the institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect.

The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 241, this Court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in *Norwood v. Baker*, 172 U. S. 269, 277; *Smyth v. Ames*, 169 U. S. 466, 524; and *San Diego Land Co. v. National City*, 174 U. S. 739, 754.

Likewise, this Court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right. *Gitlow v. New York*, 268 U. S. 652, 666; *Stromberg v. California*, 283 U. S. 359, 368; *Near v. Minnesota*, 283 U. S. 697, 707.

These later cases established that notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U. S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. Evidently this Court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. \* \* \*

It never has been doubted by this Court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. \* \* \*

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

\* \* \*

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of

due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. \* \* \*

The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Judgments reversed.

MR. JUSTICE BUTLER, dissenting. \* \* \*

If there had been any lack of opportunity for preparation, trial counsel would have applied to the court for postponement. No such application was made. There was no suggestion, at the trial or in the motion for a new trial which they made, that Mr. Roddy or Mr. Moody was denied such opportunity or that they were not in fact fully prepared. The amended motion for new trial, by counsel who succeeded them, contains the first suggestion that defendants were denied counsel or opportunity to prepare for trial. But neither Mr. Roddy nor Mr. Moody has given any support to that claim. Their silence requires a finding that the claim is groundless, for if it had any merit they would be bound to support it. And no one has come to suggest any lack of zeal or good faith on their part.

If correct, the ruling that the failure of the trial court to give petitioners time and opportunity to secure counsel was denial of due process is enough, and with this the opinion should end. But the Court goes on to declare that "the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." This is an extension of federal authority into a field hitherto occupied exclusively by the several States. Nothing before the Court calls for a consideration of the point. It was not suggested below, and petitioners do not ask for its decision here. The Court, without being called upon to consider it, adjudges without a hearing an important constitutional question concerning criminal procedure in state courts. \* \* \*

The record wholly fails to reveal that petitioners have been deprived of any right guaranteed by the Federal Constitution, and I am of opinion that the judgment should be affirmed.

MR. JUSTICE McREYNOLDS concurs in this opinion.

## NOTES

1. In *Betts v. Brady*, 316 U. S. 455, 86 L. ed. 1595, 62 Sup. Ct. 1252 (1942) defendant, charged in a Maryland court with the noncapital offense of robbery, was unable to employ counsel and asked that one be assigned to defend him. The request was refused on the ground that it was not the practice to appoint counsel for indigent defendants except in cases of murder and rape. In upholding defendant's conviction the Supreme Court held that the refusal to appoint counsel was not a denial of due process of law, the opinion stating that although "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." In reaching this conclusion the court stressed the fact that "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case." The dissenting justices (Black, Douglas and Murphy) took the view that the Fourteenth Amendment made the Sixth Amendment applicable to the states and that the consequence of the failure to provide counsel was "to defeat the promise of our democratic society to provide equal justice under the law."

The rule of *Betts v. Brady* was followed in *Foster v. Illinois*, 332 U. S. 134, 91 L. ed. 1955, 67 Sup. Ct. 1716 (1947) and *Bute v. Illinois*, 333 U. S. 640, 92 L. ed. 986, 68 Sup. Ct. 763 (1948), the court saying in the latter case: "In a noncapital state felony case, this court has recognized the constitutional right of the accused to the assistance of counsel for his defense when there are special circumstances showing that, otherwise, the defendant would not enjoy that fair notice and adequate hearing which constitutes the foundation of due process of law in the trial of any criminal charge." In *Wade v. Mayo*, 334 U. S. 672, 92 L. ed. 1647, 68 Sup. Ct. 1270 (1948) it was held that assistance of counsel must be provided if the defendant is unable to conduct his defense because of youth, ignorance or mental incapacity, and refusal to appoint counsel under such circumstances is a denial of due process of law. In *Uveges v. Pennsylvania*, 335 U. S. 437, 93 L. ed. 127, 69 Sup. Ct. 184 (1948), where the accused was a seventeen year old boy who pleaded guilty to four burglary indictments and received sentences totaling twenty to forty years, the factors of youth and inexperience in the intricacies of criminal procedure were of major importance in causing the court to conclude that assistance of counsel was a necessary element of a fair hearing. However, in the *Uveges* case other "special circumstances" were present in that the trial court made no effort to explain the consequences of a plea of guilty and at no time advised the accused of any right to counsel. Prejudice was also found in *Townsend v. Burke*, 334 U. S. 736, 92 L. ed. 1690, 68 Sup. Ct. 1252 (1948), where the court concluded that "while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue" and that "such a result, whether caused by carelessness or design, is inconsistent with due process of law." In *Palmer v. Ashe*, 342 U. S. 134, 96 L. ed. 154, 72 Sup. Ct. 191 (1951) a state prisoner, eighteen years after he had pleaded guilty to armed robbery, instituted habeas corpus proceedings in the state courts, alleging that his plea of guilty was entered without benefit of counsel, as a

result of statements made by police officers at the time of his arrest that he was charged only with breaking and entering. Without giving him an opportunity to offer evidence, the state courts dismissed the petition on the ground that the prisoner's allegations failed to show probable cause for his discharge. On certiorari the Supreme Court reversed and remanded on the ground that the particular circumstances alleged were sufficient to entitle the prisoner to a judicial hearing, and if proved to be true "would present compelling reasons why petitioner desperately needed legal counsel and services." For further analysis of Supreme Court decisions on the right to counsel, see the comprehensive annotation in 93 L. ed. 137 (1950), supplemented in 94 L. ed. 1193 (1950) and 96 L. ed. 161 (1952). See also 3 A. L. R. (2d) 1003 (1949).

2. By virtue of the specific guaranty of the Sixth Amendment, in all criminal prosecutions in the federal courts the accused is entitled to have counsel appointed by the court when, for lack of funds or other reasons, he fails to engage counsel or has not intelligently waived his right thereto. *Johnson v. Zerbst*, 304 U. S. 458, 82 L. ed. 1461, 58 Sup. Ct. 1019, 146 A. L. R. 357 (1938); *Glasser v. United States*, 315 U. S. 60, 86 L. ed. 680, 62 Sup. Ct. 457 (1942).

### MOORE v. DEMPSEY.

Supreme Court of the United States, 1923.

261 U. S. 86, 67 L. ed. 543, 43 Sup. Ct. 265.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from an order of the District Court for the Eastern District of Arkansas dismissing a writ of habeas corpus upon demurrer, the presiding judge certifying that there was probable cause for allowing the appeal. There were two cases originally, but by agreement they were consolidated into one. The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

The case stated by the petition is as follows, and it will be understood that while we put it in narrative form, we are not affirming the facts to be as stated but only what we must take them to be, as they are admitted by the demurrer: On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed. The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted. They seem to have been arrested with many others on the same day. The petitioners say that Lee must have been killed by other whites, but that, we leave on one side as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their con-

stitutional rights have been preserved. They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. It should be mentioned, however, that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October 31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.

A Committee of Seven was appointed by the Governor in regard to what the committee called the "insurrection" in the county. The newspapers daily published inflammatory articles. On the 7th a statement by one of the committee was made public to the effect that the present trouble was "a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the 'Progressive Farmers' and 'Household Union of America' established for the purpose of banding negroes together for the killing of white people." According to the statement the organization was started by a swindler to get money from the blacks.

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of the United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the petitioners were brought into court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being system-

atically excluded from both grand and petit juries. The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that "all our citizens are of the opinion that the law should take its course." Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial enterprises of the city passed a resolution to the same effect. In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921, but that the execution was stayed by proceedings in court; we presume the proceedings before the Chancellor to which we shall advert.

In *Frank v. Mangum*, 237 U. S. 309, 335, it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state

deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the state may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the Supreme Court the judgment was affirmed. The Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came too late and by way of answer to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for habeas corpus was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but the Supreme Court of the state held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.

MR. JUSTICE McREYNOLDS, dissenting.

We are asked to overrule the judgment of the District Court discharging a writ of habeas corpus by means of which five negroes sought to escape electrocution for the murder of Clinton Lee. Sec. 753, Rev. Stats. They were convicted and sentenced in the circuit court of

Phillips county, Arkansas, two years before the writ issued. The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the ex parte affidavits of three other negroes who had pleaded guilty and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men—low villains according to their own admissions. It should be remembered that to narrate the allegations of the petition is but to repeat statements from these sources. Considering all the circumstances—the course of the cause in the state courts and upon application here for certiorari, etc.—the District Court held the alleged facts insufficient *prima facie* to show nullity of the original judgment.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," and thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. \* \* \*

Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great state, which this court has refused to review, can be successfully impeached by the mere ex parte affidavits made upon information and belief of ignorant convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.

I am authorized to say that MR. JUSTICE SUTHERLAND concurs in this dissent.

#### NOTES

1. Prior to granting habeas corpus in the reported case the Supreme Court had denied certiorari. For an adverse criticism of this procedure, see Note, 33 Yale L. J. 82 (1923). The hearing ordered by the court was never held, as the death sentence imposed upon the petitioners in the state court was commuted to twelve years by the Governor of Arkansas and the habeas corpus proceedings in the federal court were finally dismissed for want of prosecution. Subsequently the six prisoners were indefinitely furloughed after serving less than six years in the penitentiary. See Waterman and Overton, *The Aftermath of Moore v. Dempsey*, 18 St. Louis L. Rev. 117 (1933), reprinted in 6 Ark. L. Rev. 1 (1931-52). See also, Overton and Waterman, *Federal Habeas Corpus Statutes and Moore v. Dempsey*, 1 U. of Chi. L. Rev. 307 (1933), 2 Selected Essays on Constitutional Law (1938), 1477; Kaplan, *Federal Review of Criminal Trials in State Courts Through Due Process*, 23 J. Crim. Law and Criminology 841 (1933), 2 Selected Essays on Constitutional Law (1938), 1491. The significance of *Moore v. Dempsey* is thus seen to be that it established the principle that the Fourteenth Amendment extends to a defendant in a criminal prosecution in a state court the right to have a fair and impartial trial, at least so far as freedom from mob coercion is concerned; and that this right may be enforced in the federal courts. For a case in which a federal court on habeas corpus found upon trial that the state trial court had been dominated by a mob and discharged the accused, see *Downer v. Dunaway*, 1 F. Supp. 1001 (1932).

2. In a criminal prosecution the defendant has a constitutional right under the due process clause to trial before an unbiased judge. In *Tumey v. Ohio*, 273 U. S. 510, 71 L. ed. 749, 47 Sup. Ct. 437 (1927), statutes provided for trial by the mayor of a village of offenses against the state prohibition law, half the fines collected going to the treasury of the municipality, and a municipal ordinance provided that the mayor should receive, in addition to his salary, the amount of his costs in such cases, the costs being paid by the defendant only in the event of his conviction. The Supreme Court, in reversing *Tumey's* conviction, said: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."

3. If the hearing in the court of first instance satisfies the requirements of due process, the right of appeal may be dispensed with. In *McKane v. Durston*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. 913 (1894), sustaining a New York statute making admission to bail pending appeal discretionary, though in most states the right is absolute, the court said, through Mr. Justice Harlan: "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. It is, therefore, clear that the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." In England, before the enactment of the Criminal Appeal Act of 1907 (7 Edw. VII, ch. 23) there was no right of direct appeal from the verdict of a jury on the merits of the case, and not even on a point of law unless the judge of the trial court saw fit to "state a case" for the ultimate decision of the King's Bench Division. See Howard, *Criminal Justice in England* (1931), 275 *et seq.*

4. The right to a public trial, guaranteed by the Sixth Amendment, and long considered an effective restraint on the abuse of judicial power, has recently been under consideration. In *In re Oliver*, 333 U. S. 257, 92 L. ed. 682, 68 Sup. Ct. 499 (1948) it was held that commitment of a witness for contempt in a secret proceeding without public trial on a charge of giving false and evasive testimony, by a judge sitting as a "one-man grand jury" as authorized by a Michigan statute, constituted a denial of procedural due process. Mr. Justice Black, speaking for the court, declared it to be "the law of the land" that no person's life, liberty or property should be forfeited under circumstances such as those disclosed by the record in this case, "in view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public." Justices Frankfurter and Jackson, dissenting, thought that the record before the court was insufficient to justify it in passing on the constitutional issues until after they had been more fully considered in the state courts. In *United States v. Koblitz*, 172 F. (2d) 919 (C. A. 3d 1949) it was held that the indiscriminate exclusion of the public from the courtroom during a trial for violation of the Mann Act was a deprivation of the defendant's right to a public trial under the Sixth Amendment. Here the judge, feeling that the indecent nature of the case required it, directed that the courtroom be cleared of all people except defendants, counsel, witnesses and members of the press. For a discussion of the cases, state and federal, see Note, 23 So. Cal. L. Rev. 91 (1949). See also Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381 (1932); Notes, 49 Col. Law Rev. 110 (1949), 97 U. of Pa. L. Rev. 276 (1948). In general, on the Sixth Amendment guaranties, see Heller, *The Sixth Amendment* (1951).

5. Defendant was convicted of murder in the first degree. In imposing the death penalty, over the recommendation of the jury of life imprisonment, the trial judge considered probation reports and privately obtained information indicating participation by the defendant in thirty burglaries of which he had not been convicted. This pre-sentence investigation information concerning defendant's background, though relevant to the question of punishment and permitted by a New York statute, could not have been brought to the attention of the jury in its consideration of the issue of guilt. Defendant contended that this statutory procedure violated the due process clause of the Fourteenth Amendment in that the death sentence was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal. In upholding the challenged procedure the court recognized that due process required "that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses" and that "these salutary and time-tested protections" were essential where the question under consideration was the defendant's guilt. Here, however, where the question of punishment was involved, the court said that it could not treat the due process clause as "a uniform command that courts throughout the nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence." Justices Murphy and Rutledge dissented. *Williams v. New York*, 337 U. S. 241, 93 L. ed. 1337, 69 Sup. Ct. 1079 (1949).

6. The due process clause of the Fourteenth Amendment gives a defendant a right to be present at his trial only when his presence is reasonably necessary to insure his right to an opportunity to be heard. In *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. ed. 674, 54 Sup. Ct. 330, 90 A. L. R. 575 (1934) the court affirmed a conviction for murder although the accused had not been permitted to accompany the jury on a view of the premises where the crime was alleged to have been committed. The court said that the right to be present at a view of the locale was not a "fundamental" right but only one to be granted when the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Justices Roberts, Brandeis, Sutherland and Butler dissented.

### TWINING v. NEW JERSEY.

Supreme Court of the United States, 1908.

211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. 14.

[Defendant and another were indicted for a criminal offense in a New Jersey court, convicted and sentenced to six and four years imprisonment respectively. At the trial the accused refrained from testifying and objected to the judge's instruction: "Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him" by other testimony. The court of last resort of the state affirmed the conviction over the contention that the trial judge's instruction violated an immunity of an accused from testifying against himself and that this immunity was secured by the Fourteenth Amendment. This writ of error was taken.]

MR. JUSTICE MOODY delivered the opinion of the Court. \* \* \*

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original thirteen states (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in constitutions or bills of rights; Maryland had provided in her constitution (1776) that "no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practiced in this state or may hereafter be directed by the legislature;" and in the remainder of those states there seems to be no doubt that it was recognized by the courts. The privilege was not included in the federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to the states by the first Congress, and by them adopted. Since then all the states of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those states it is held to be part of the existing law [common law or statute]. *State v. Zdanowicz*, 69 N. J. L. 619; *State v. Height*, 117 Iowa, 650. It is obvious from this short statement that it has been supposed by the states that, so far as the state courts are concerned, the privilege had its origin in the constitution and laws of the states, and that persons appealing to it must look to the state for their protection. Indeed, since by the unvarying decisions of this court the first ten Amendments of the federal Constitution are restrictive only of national action, there was nowhere else to look, up to the time of the adoption of the Fourteenth Amendment, and the state, at least until then, might give, modify or withhold the privilege at its will. The Fourteenth Amendment withdrew from the states powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union.

The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds. *Adams v. New York*, 192 U. S. 585; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541. The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the states to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person \* \* \* shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the states. *Barron v. Baltimore*, 7 Pet. 243; *Spies v. Illinois*, 123 U. S. 131; *Brown v. New Jersey*, 175 U. S. 172; *Barrington v. Missouri*, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of national citizenship, placed under national protection by the Fourteenth Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against state action by that Amendment, include those fundamental personal rights which were protected against national action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. The meaning of the phrase "privileges and immunities of citizens of the United States," as used in the Fourteenth Amendment, came under early consideration in the *Slaughter-House Cases*, 16 Wall. 36. \* \* \*

We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the states.

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safe-guarded against state action because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. \* \* \*

The question under consideration may first be tested by the application of these settled doctrines of this Court. If the statement of Mr.

Justice Curtis, as elucidated in *Hurtado v. California*, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Charta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. \* \* \*

But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. \* \* \* One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decisions in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right, secured by Magna Charta to be condemned only by the law of the land, and sets forth by way of grievance divers violations of it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English Courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, ap-

parently without a thought that the question was affected by the law of the land of Magna Charta, or the due process of law which is its equivalent.

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. \* \* \*

But the history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. Five states, Delaware, Pennsylvania, New Jersey, Georgia and Connecticut, ratified the Constitution without proposing amendments. Massachusetts then followed with a ratification, accompanied by a recommendation of nine amendments, none of which referred to the privilege; Maryland with a ratification without proposing amendments; South Carolina with a ratification accompanied by a recommendation of four amendments, none of which referred to the privilege, and New Hampshire with a ratification accompanied by a recommendation of twelve amendments, none of which referred to the privilege. The nine states requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. Virginia was the tenth state to ratify, proposing, by separate resolution, an elaborate Bill of Rights under twenty heads, and in addition twenty amendments to the body of the Constitution. Among the rights enumerated as "essential and inalienable" is that no man "can be compelled to give evidence against himself," and "no freeman ought to be deprived of his life, liberty or property but by the law of the land." New York ratified with a proposal of numerous amendments and a declaration of rights which the convention declared ought not be violated and were consistent with the Constitution. One of these rights was that "No person ought to be taken, imprisoned or deprived of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty or property but by due process of law;" and another was that "in all criminal prosecutions the accused \* \* \* should not be compelled to give evidence against himself." North Carolina and Rhode Island were the last to ratify, each proposing a large number of amendments, including the provision that no man "can be compelled to give evidence against himself;" and North Carolina, that "no freeman ought to be \* \* \* deprived of his life, liberty or property but by the law of the land;" and Rhode Island, that "no freeman ought to be \* \* \* deprived of his life, liberty or property but by the trial by jury, or by the law of the land."

Thus it appears that four only of the thirteen original states insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three states proposing amendments were silent upon this subject. It is worthy of note that two of these four states did not incorporate the privilege in their own constitutions, where it would have

had much wider field of usefulness, until many years after. New York in 1821 and Rhode Island in 1842 (its first constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. Congress, in submitting the amendments to the several states, treated the two rights as exclusive of each other. Such also has been the view of the states in framing their own constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (*State v. Height*, 117 Iowa, 650), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoy v. Neff*, 95 U. S. 714, 733; *Scott v. McNeal*, 154 U. S. 34; *Old Wayne Life Association v. McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, *Hovey v. Elliott*, 167 U. S. 409; *Roller v. Holly*, 176 U. S. 398; and see *Londoner v. Denver*, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. \* \* \*

Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been

universally assented to since the days of Bentham; many doubt it today, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of national citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The states had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that state made the same ruling. \* \* \*

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Reg. v. Rhodes* (1899), 1 Q. B. 77; *Ex parte Kops* (1894), A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution.

Judgment affirmed.

[A dissenting opinion by Mr. JUSTICE HARLAN is omitted.]

#### NOTES

1. In *Adamson v. California*, 332 U. S. 46, 91 L. ed. 1903, 67 Sup. Ct. 1672, 171 A. L. R. 1223 (1947) the holding of the principal case was reaffirmed in a five-to-four decision, Justices Black, Douglas, Murphy and Rutledge dissenting. The California Constitution and penal code provide that the failure of the defendant in a criminal prosecution to explain or deny by his testimony any evidence against him, whether he takes the stand or not, may be commented upon

by the court and counsel and may be considered by the court and jury. In upholding these provisions the majority, relying upon the judicial history of the Fourteenth Amendment, refused to hold that the due process clause of the Fourteenth Amendment drew all the guaranties of the federal Bill of Rights under its protection. The dissenting justices contended that the framers and ratifiers of the Amendment intended to safeguard against state action all the privileges and immunities contained in the first eight amendments and deplored the consequences of "the court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights." In the course of a concurring opinion Mr. Justice Frankfurter said: "Even the boldest innovator would shrink from suggesting to more than half the states that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the states of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars." For an extensive analysis and criticism from the historical standpoint, of the issues raised by the dissent, see Fairman and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 *Stanf. L. Rev.* 5, 140 (1949). See also Flack, *The Adoption of the Fourteenth Amendment* (1908); Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Congress, 1865-1867 (1914); Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 *Mich. L. Rev.* 869 (1948); Green, *The Supreme Court, the Bill of Rights and the States*, 97 *U. of Pa. L. Rev.* 608 (1949).

2. In *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682, 56 Sup. Ct. 461 (1936) the conviction of three Negroes for murder solely upon the basis of confessions obtained by brutality and physical torture was held to constitute a denial of due process of law. Chief Justice Hughes said for a unanimous court that while the state was free to regulate the procedure of its courts in accordance with its own conceptions of policy, it was limited by the requirements of due process of law. "Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand." Moreover, the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved, was no bar to relief. Petitioners' complaint here was not of "the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." The same result was reached in *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. ed. 1192, 64 Sup. Ct. 921 (1944) where the prisoner confessed to a murder after thirty-six hours of continuous questioning under powerful electric lights, by relays of officers, experienced investigators and highly trained lawyers, though without any physical torture.

Other cases in which confessions were found to be procured under circumstances violative of the due process clause are *Chambers v. Florida*, 309 U. S. 227, 84 L. ed. 716, 60 Sup. Ct. 742 (1940); *White v. Texas*, 309 U. S. 631, 84 L. ed. 989, 60 Sup. Ct. 706 (1940); *Canty v. Alabama*, 309 U. S. 629, 84 L. ed. 988, 60 Sup. Ct. 612 (1940); *White v. Texas*, 310 U. S. 530, 84 L. ed. 1342, 60 Sup. Ct. 1032 (1940); *Vernon v. Alabama*, 313 U. S. 547, 85 L. ed. 1513, 61 Sup. Ct. 1092 (1941); *Lomax v. Texas*, 313 U. S. 544, 85 L. ed. 1511, 61 Sup. Ct. 956 (1941); *Ward v. Texas*, 316 U. S. 547, 86 L. ed. 1663, 62 Sup. Ct. 1139 (1942); *Malinski v. New York*, 324 U. S. 401, 89 L. ed. 1029, 65 Sup. Ct. 781 (1945); *Haley v. Ohio*, 332 U. S. 596, 92 L. ed. 224, 68 Sup. Ct. 302 (1948); *Watts v. Indiana*, 338 U. S. 49, 93 L. ed. 1801, 69 Sup. Ct. 1347 (1949); *Turner v. Pennsylvania*, 338 U. S. 62, 93 L. ed. 1810, 69 Sup. Ct. 1352 (1949); *Harris v. South Carolina*, 338 U. S. 68, 93 L. ed. 1815, 69 Sup. Ct. 1354 (1949); *Johnson v. Pennsylvania*, 340 U. S. 881, 95 L. ed. 640, 71 Sup. Ct. 191 (1950).

Confessions were found to have been procured under circumstances not violative of the due process clause in *Lyons v. Oklahoma*, 322 U. S. 596, 88 L. ed. 1481, 64 Sup. Ct. 1208 (1944); *Lisenba v. California*, 314 U. S. 219, 86 L. ed. 166, 62 Sup. Ct. 280 (1941); *Gallegos v. Nebraska*, 342 U. S. 55, 96 L. ed. 86, 72 Sup. Ct. 141 (1951).

3. Although the nature of the due process clause gives wide range to the reviewing power of the Supreme Court over convictions in state courts, the court does not have the extent of corrective power over state courts that it has over the lower federal courts. In *McNabb v. United States*, 318 U. S. 332, 87 L. ed. 819, 63 Sup. Ct. 608 (1943) the record showed that confession to a murder was obtained while the prisoners were being held by federal officers for a two-day period before being brought before any judicial officer for arraignment, as required by federal statutes. During this period of apparently illegal confinement they were subjected to unremitting questioning, without benefit of counsel. In reversing a conviction based upon the confession thus obtained, the court said, through Mr. Justice Frankfurter: "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts."

In *United States v. Carignan*, 342 U. S. 36, 96 L. ed. 48, 72 Sup. Ct. 97 (1951) the court refused to extend the *McNabb* fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges. "Complete protection is afforded the civil rights of an accused who makes an involuntary confession or statement when such confession must be excluded by the judge or disregarded by the jury upon proof that it is not voluntary." Here the court, affirming the reversal of a conviction for murder, rested its decision on the ground that, while the admission of the confession did not violate due process or federal rules of evidence because made before arraignment and while defendant was legally in detention on another charge, the trial judge erred in refusing to admit defendant's testimony relating to its alleged involuntary character. The purpose of the *McNabb* rule was said to be "to abolish unlawful detention." Justices Douglas, Black and Frankfurter, concurring in the result, said that the confession should not have been admitted. "The rule of evidence we announce today gives sanction to a police practice which makes detention the means of investigation. Therein lies its vice."

4. In *Stroble v. California*, 343 U. S. 181, 96 L. ed. 872, 72 Sup. Ct. 599 (1952), affirming by a six-to-three vote a state court conviction for murder, the court considered five separate grounds for petitioner's claim that his conviction lacked due process of law: (1) use of a coerced confession; (2) impossibility of a fair trial because of inflammatory newspaper reports inspired by the district attorney; (3) deprivation of effective counsel when trial by jury was waived on the issue of insanity; (4) unwarranted delay in arraignment, and (5) unjustifiable refusal of prosecuting officers to permit an attorney to consult petitioner shortly after his arrest.

5. Convictions in state courts obtained by prosecuting officials through fraud or trickery, misrepresentation as to the consequences of a plea of guilty, the

knowing use of perjured testimony, or deliberate suppression of testimony favorable to the accused, constitute a violation of due process. *Mooney v. Holohan*, 294 U. S. 103, 79 L. ed. 791, 55 Sup. Ct. 340, 98 A. L. R. 406 (1935); *Smith v. O'Grady*, 312 U. S. 329, 85 L. ed. 859, 61 Sup. Ct. 572 (1941); *Pyle v. Kansas*, 317 U. S. 213, 87 L. ed. 214, 63 Sup. Ct. 177 (1942). See the annotation in 87 L. ed. 217 (1943).

### ROCHIN v. CALIFORNIA.

Supreme Court of the United States, 1952.

342 U. S. 165, 96 L. ed. 183, 72 Sup. Ct. 205, 25 A. L. R. (2d) 1396.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, his common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed the deputies spied two capsules. When asked "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was hand-cuffed and taken to a hospital. At the direction of one of the officers a doctor forced *invito* an emetic solution into Rochin's stomach by means of a tube. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code 1947, § 11500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3. One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional rights," concurred only because he felt bound by the decisions of his Supreme Court. These, he asserted, "have been looked

upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts." Ibid. The Supreme Court of California denied without opinion Rochin's petition for a hearing. Two justices dissented from this denial, and in doing so expressed themselves thus: "\* \* \* a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse. \* \* \* Had the evidence forced from defendant's lips consisted of an oral confession that he illegally possessed a drug \* \* \* he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this state are permitted to base a conviction upon it. [We] find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse." 101 Cal. App. 2d 143, 149-150, 225 P. 2d 913, 917-918.

This Court granted certiorari, 341 U. S. 939, because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States.

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const. Art. I, § 8, cl. 18. Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, § 10, cl. 1, in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments.

These limitations, in the main, concern not restrictions upon the power of the States to define crime, except in the restricted area where Federal authority has pre-empted the field, but restrictions upon the manner in which the States may enforce their penal code. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Malinski v. New York*, 324 U. S. 401, 412, 418. Due process of law, "itself a historical product," *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses." *Malinski v. New York*, supra, 324 U. S. at pages 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U. S. 97, 105, or are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 325.

The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the Federal courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant. On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Thus it is that even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, *The Nature of the Judicial Process*; *The Growth of the Law*; *The Paradoxes of Legal Science*. These are considerations deeply rooted in reason and in the

compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of "natural law." To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be definite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. It was not true even before the series of recent cases enforced the constitutional principle that the States may not base con-

victions upon confessions, however much verified, but obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that prosecutions cannot be brought about by methods that offend "a sense of justice." See Mr. Chief Justice Hughes, speaking for a unanimous Court in *Brown v. Mississippi*, 297 U. S. 278, 285-286. It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. Indeed the California Supreme Court has not sanctioned this mode of securing a conviction. It merely exercised its discretion to decline a review of the conviction. All the California judges who have expressed themselves in this case have condemned the conduct in the strongest language.

We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis v. Mills*, 194 U. S. 451, 457.

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be reversed. Reversed.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring.

*Adamson v. California*, 332 U. S. 46, 68-123, sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that "No person \* \* \* shall be compelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. Cf. *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547, 562; *Bram v. United States*, 168 U. S. 532; *Chambers v. Florida*, 309 U. S. 227. California convicted this petitioner by using against him evidence obtained in this manner, and I agree with MR. JUSTICE DOUGLAS that the case should be reversed on this ground.

In the view of the majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct." The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that "[w]e may not draw on our merely personal and private notions"; our judgment must be grounded on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and conscience of our people"; or by "those canons of decency and fairness which express the notions of justice of English-speaking peoples." These canons are made necessary, it is said, because of "interests of society pushing in opposite directions."

If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what

are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts." \* \* \*

What paralyzing role this same philosophy will play in the future economic affairs of this country is impossible to predict. Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.

MR. JUSTICE DOUGLAS, concurring.

The evidence obtained from this accused's stomach would be admissible in the majority of states where the question has been raised. So far as the reported cases reveal, the only states which would probably exclude the evidence would be Arkansas, Iowa, Michigan, and Missouri. Yet the Court now says that the rule which the majority of the states have fashioned violates the "decencies of civilized conduct." To that I cannot agree. It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration.

As an original matter it might be debatable whether the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse. That was the issue recently surveyed in *Adamson v. California*, 332 U. S. 46. The Court rejected the view that compelled testimony should be excluded and held in substance that the accused in a state trial can be forced to testify against himself. I disagree. Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat. See *Holt v. United States*, 218 U. S. 245, 252-253. But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.

That is an unequivocal, definite and workable rule of evidence for state and federal courts. But we cannot in fairness free the state courts from that command and yet excoriate them for flouting the "decencies of civilized conduct" when they admit the evidence. That is to make

the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here.

The damage of the view sponsored by the Court in this case may not be conspicuous here. But it is part of the same philosophy that produced *Betts v. Brady*, 316 U. S. 455, denying counsel to an accused in a state trial against the command of the Sixth Amendment and *Wolf v. Colorado*, 338 U. S. 25, allowing evidence obtained as a result of a search and seizure that is illegal under the Fourth Amendment to be introduced in a state trial. It is part of the process of erosion of civil rights of the citizen in recent years.

#### NOTE

1. At a trial of three defendants (Stein, Wissner and Cooper) in a New York state court on charges of felony murder, the evidence included confessions by two of the defendants (Cooper and Stein), implicating all three defendants. All objected to introduction of each confession on the ground that it was coerced. Wissner further moved as to each that, if Cooper's and Stein's confessions were admitted, all reference to him be stricken from them. The trial court heard evidence in the presence of the jury as to the issue of coercion and left determination of the question to the jury, under instructions to consider the confessions only if it found them to be voluntary. None of the defendants testified. The jury returned a general verdict of guilty and defendants were sentenced to death. The New York Court of Appeals affirmed. The defendants contended that the use of these confessions created a constitutional infirmity which required reversal. On certiorari, however, the Supreme Court upheld the convictions, holding that due process is not violated by state practice under which the question of voluntariness of a confession is left to the jury for ultimate determination by a general verdict, even though in case of a verdict of guilty it cannot be known whether or not the confession issue was decided in accused's favor. The jury could, without constitutional error, either find that the confessions were admissible or, finding them not admissible, convict upon other evidence; and a conviction upon a general verdict of guilty is not subject to reversal merely because the jury might have rejected the confessions as coerced. Nor is due process denied by state practice under which the accused, if he does testify as to police coercion in obtaining a confession, is subject to cross-examination testing his credibility, even if such cross-examination discloses a prior criminal record. The admission of the confessions was further held not to violate any federal right of defendant Wissner, even if the confessions were considered to have been involuntary. Justices Black, Frankfurter and Douglas dissented in separate opinions. *Stein v. New York*, 346 U. S. 156, 97 L. ed. 1522, 73 Sup. Ct. 1077 (1953). The case is discussed in Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts,"* 41 Cal. L. Rev. 672 (1953).

#### PALCO v. CONNECTICUT.

Supreme Court of the United States, 1937.  
302 U. S. 319, 82 L. ed. 288, 58 Sup. Ct. 149.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the

Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 \* \* \*. Public Acts, 1886, p. 560; now § 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State v. Palko*, 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction, 122 Conn. 529; 191 Atl. 320, adhering to a decision announced in 1894, *State v. Lee*, 65 Conn. 265; 30 Atl. 1110, which upheld the challenged statute. *Cf. State v. Muolo*, 118 Conn. 373; 172 Atl. 875. The case is here upon appeal. 28 U. S. C., § 344.

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in *Dreyer v. Illinois*, 187 U. S. 71, 85, and was

passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in *Kepner v. United States*, 195 U. S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. *Cf. Trono v. United States*, 199 U. S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U. S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels, *Snyder v. Massachusetts*, 291 U. S. 97, 114, must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This Court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California*, 110 U. S. 516; *Gaines v. Washington*, 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining v. New Jersey*, 211 U. S. 78, 106, 111, 112. *Cf. Snyder v. Massachusetts*, *supra*, p. 105; *Brown v. Mississippi*, 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v.*

Sauvinet, 92 U. S. 90; Maxwell v. Dow, 176 U. S. 581; New York Central R. Co. v. White, 243 U. S. 188, 208; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to Weeks v. United States, 232 U. S. 383, 398, and as to other provisions of the Sixth, to West v. Louisiana, 194 U. S. 258.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the first Amendment safeguards against encroachment by the Congress, *De Jonge v. Oregon*, 299 U. S. 353, 364; *Herndon v. Lowry*, 301 U. S. 242, 259; or the like freedom of the press, *Grosjean v. American Press Co.*, 297 U. S. 233; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 707; or the free exercise of religion, *Hamilton v. Regents*, 293 U. S. 245, 262; cf. *Grosjean v. American Press Co.*, *supra*; *Pierce v. Society of Sisters*, 268 U. S. 510; or the right of peaceable assembly, without which speech would be unduly trammelled, *De Jonge v. Oregon*, *supra*; *Herndon v. Lowry*, *supra*; or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama*, 287 U. S. 45. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, *supra*, p. 105; *Brown v. Mississippi*, *supra*, p. 285; *Hebert v. Louisiana*, 272 U. S. 312, 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey*, *supra*. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi*, *supra*. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the

privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining v. New Jersey*, *supra*, p. 99. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. *Cf. Near v. Minnesota ex rel. Olson*, *supra*; *De Jonge v. Oregon*, *supra*. Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott v. McNeal*, 154 U. S. 34; *Blackmer v. United States*, 284 U. S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell v. Alabama*, *supra*, pp. 67, 68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unflinching throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the

base of all our civil and political institutions"? *Hebert v. Louisiana*, supra. The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch*, 92 Vt. 477; 105 Atl. 23; *State v. Lee*, supra. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State v. Carabetta*, 106 Conn. 114; 127 Atl. 394, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment.

*Maxwell v. Dow*, supra, p. 584, gives all the answer that is necessary.

The judgment is

Affirmed.

MR. JUSTICE BUTLER dissents.

## NOTES

1. Not the least importance of the *Palko* decision lies in the fact that it gives the court's official explanation, up to the year 1937, of the reasons why some of the guaranties of the federal Bill of Rights had been classified as essential to due process of law and thus binding on the states under the Fourteenth Amendment, and others had not been deemed to be implicit in the due process concept and hence not protected against adverse state action.

2. The double jeopardy guaranty of the Fifth Amendment prevents an appeal from being taken by the government in a criminal prosecution in the federal courts and a verdict of not guilty is therefore final. *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. 609 (1892); *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. 1192 (1896). If a jury is discharged for failure to agree upon a verdict, or if a verdict is not obtained for any cause whatever, retrial of the defendant does not constitute double jeopardy. *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165 (1824). A defendant who is convicted and procures a reversal of the judgment upon appeal thereby waives his defense of double jeopardy and at his second trial may be convicted of an offense of a higher degree than that of which he was originally convicted. *Trono v. United States*, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. 121, 4 Ann. Cas. 773 (1905).

3. At the trial of accused in a state court two participants in the crime, who in a separate trial had been found guilty but had not yet been sentenced, declined to testify for the state on the ground of self-incrimination. Thereupon the trial court granted the prosecutor's motion for a mistrial and continuance

of the case pending final judgment against the witnesses. After such final judgment had been entered, the defendant was retried and convicted over his objection that he was placed in double jeopardy and denied due process of law, contrary to the Fourteenth Amendment. The Supreme Court, noting that the issue of whether such a procedure would be double jeopardy under the Fifth Amendment was not raised in the case, held that no violation of due process had resulted. The decision was rested on the doctrine of the Palko case. "Justice to either or both parties may indicate to the wise discretion of the trial judge that he declare a mistrial and require the defendant to stand trial before another jury. As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. The pattern here, long in use in North Carolina, does not deny the fundamental essentials of a trial, 'the very essence of a scheme of ordered justice,' which is due process." Chief Justice Vinson and Mr. Justice Douglas delivered separate dissenting opinions and Mr. Justice Black did not participate. *Brock v. North Carolina*, 344 U. S. 424, 97 L. ed. 456, 73 Sup. Ct. 349 (1953).

4. The prohibition of the Fifth Amendment against the taking of private property for public use without just compensation is applicable to the states through the due process clause of the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. 581 (1897). See, however, *Roberts v. New York*, 295 U. S. 264, 79 L. ed. 1429, 55 Sup. Ct. 689 (1935), holding that to constitute a taking of property without due process of law by force of a judgment in a condemnation proceeding, "the error must be gross and obvious, coming close to the boundary of arbitrary action."

5. The guaranty of the Eighth Amendment against the infliction of cruel and unusual punishments was invoked by the petitioner in *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 91 L. ed. 422, 67 Sup. Ct. 374 (1947), which involved a conviction for murder and a sentence of electrocution which, however, because of accidental failure of the mechanism, did not result in death. A majority of the court held that the new death warrant which followed the unsuccessful attempt to impose the death penalty did not amount to double jeopardy or to cruel and unusual punishment in the constitutional sense. However, Mr. Justice Reed, speaking for four justices and announcing the court's judgment, said: "Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner." Four dissenting justices, in an opinion by Mr. Justice Burton, said that the judgment of the state court should be vacated and the cause remanded for further investigation as to certain material facts (including the extent, if any, to which electric current had been applied), in order to determine whether the sentence could be imposed without violating the constitutional guaranty. See also *Johnson v. Dye*, 175 F. (2d) 250 (C. A. 3d 1949), noted in 23 So. Cal. L. Rev. 86 (1949), applying the test of the Palko case and holding that freedom from cruel and unusual punishment guaranteed by the Eighth Amendment is a basic and fundamental right which, through the Fourteenth Amendment, is protected against abridgment by the states. Judgment was reversed per curiam by the Supreme Court for failure of petitioner, who had escaped from a Georgia chain gang and was being held for interstate rendition in Pennsylvania, to exhaust remedies available in the state courts before seeking relief in a federal court. *Dye v. Johnson*, 338 U. S. 864, 94 L. ed. 530, 70 Sup. Ct. 146 (1949).

## WOLF v. COLORADO.

Supreme Court of the United States, 1949.  
338 U. S. 25, 93 L. ed. 1782, 69 Sup. Ct. 1359.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*, 232 U. S. 383? The Supreme Court of Colorado has sustained convictions in which such evidence was admitted, 117 Colo. 279, 187 P. 2d 926; 117 Colo. 321, 187 P. 2d 928, and we brought the cases here. 333 U. S. 879.

Unlike the specific requirements and restrictions placed by the Bill of Rights (Amendments 1 to 8) upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, *e. g.*, *Hurtado v. California*, 110 U. S. 516; *Twining v. New Jersey*, 211 U. S. 78; *Brown v. Mississippi*, 297 U. S. 278; *Palko v. Connecticut*, 302 U. S. 319. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. *Adamson v. California*, 332 U. S. 46. The issue is closed.

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in *Palko v. Connecticut*, 302 U. S. 319, *supra*. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to speak only of the dead. In rejecting the suggestion that the Due Process Clause incorporated the original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that Court a different but deeper and more pervasive conception of the Due Process Clause. This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of 'ordered liberty.'" 302 U. S. at 325.

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society.

But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." *Davidson v. New Orleans*, 96 U. S. 97, 104. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since *Davidson v. New Orleans* was decided.

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment, for these are issues not susceptible of quantitative solutions. In *Weeks v. United States*, *supra*, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary in-

trusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the Weeks decision.

I. Before the Weeks decision 27 States had passed on the admissibility of evidence obtained by unlawful search and seizure.

(a) Of these, 26 States opposed the Weeks doctrine. \* \* \*

(b) Of these, 1 State anticipated the Weeks doctrine. \* \* \*

II. Since the Weeks decision 47 States all told have passed on the Weeks doctrine. \* \* \*

(a) Of these, 20 passed on it for the first time.

(1) Of the foregoing States, 6 followed the Weeks doctrine.  
\* \* \*

(2) Of the foregoing States, 14 rejected the Weeks doctrine.  
\* \* \*

(b) Of these, 26 States reviewed prior decisions contrary to the Weeks doctrine.

(1) Of these, 10 States have followed Weeks, overruling or distinguishing their prior decisions. \* \* \*

(2) Of these, 16 States adhered to their prior decisions against Weeks. \* \* \*

(c) Of these, 1 State adhered to its prior formulation of the Weeks doctrine. \* \* \*

III. As of today 30 States reject the Weeks doctrine, 17 States are in agreement with it. \* \* \*

IV. Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible.  
\* \* \*

The jurisdictions which have rejected the Weeks doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion

of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. Weighty testimony against such an insistence on our own view is furnished by the opinion of Mr. Justice, then Judge, Cardozo in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585. We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress under § 5 of the Fourteenth Amendment undertake to enforce the rights there guaranteed by attempting to make the Weeks doctrine binding upon the States.

Affirmed.

[An elaborate series of tables follows showing the acceptance or rejection of the Weeks rule by the various states.]

MR. JUSTICE BLACK, concurring.

In this case petitioner was convicted of a crime in a state court on evidence obtained by a search and seizure conducted in a manner that this Court has held "unreasonable" and therefore in violation of the Fourth Amendment. And under a rule of evidence adopted by this Court evidence so obtained by federal officers cannot be used against defendants in federal courts. For reasons stated in my dissenting opinion in *Adamson v. California*, 332 U. S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of "unreasonable searches and seizures" is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited "unreasonable searches and seizures," but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of

the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. See *McNabb v. United States*, 318 U. S. 332. This leads me to concur in the Court's judgment of affirmance.

It is not amiss to repeat my belief that the Fourteenth Amendment was intended to make the Fourth Amendment in its entirety applicable to the states. The Fourth Amendment was designed to protect people against unrestrained searches and seizures by sheriffs, policemen and other law enforcement officers. Such protection is an essential in a free society. And I am unable to agree that the protection of people from over-zealous or ruthless state officers is any less essential in a country of "ordered liberty" than is the protection of people from over-zealous or ruthless federal officers. Certainly there are far more state than federal enforcement officers and their activities, up to now, have more frequently and closely touched the intimate daily lives of people than have the activities of federal officers. A state officer's "knock at the door \* \* \* as a prelude to a search, without authority of law," may be, as our experience shows, just as ominous to "ordered liberty" as though the knock were made by a federal officer.

MR. JUSTICE DOUGLAS, dissenting.

I believe for the reasons stated by MR. JUSTICE BLACK in his dissent in *Adamson v. California*, 332 U. S. 46, 68, that the Fourth Amendment is applicable to the States. I agree with MR. JUSTICE MURPHY that the evidence obtained in violation of it must be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction. I also agree with him that under that test this evidence was improperly admitted and that the judgments of conviction must be reversed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE joins, dissenting.

It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong. Of course I agree with the Court that the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the Fourth Amendment. \* \* \* Quite apart from the blanket application of the Bill of Rights to the States, a devotee of democracy would ill suit his name were he to suggest that his home's protection against unlicensed governmental invasion was not "of the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 325. It is difficult for me to understand how the Court can go this far and yet be unwilling to make the step which can give some meaning to the pronouncements it utters.  
\* \* \*

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do

him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police. \* \* \*

I cannot believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions, even if we follow the Palko "test." Today's decision will do inestimable harm to the cause of fair police methods in our cities and states. Even more important, perhaps, it must have tragic effect upon public respect for our judiciary. For the Court now allows what is indeed shabby business: lawlessness by officers of the law.

Since the evidence admitted was secured in violation of the Fourth Amendment, the judgment should be reversed.

[MR. JUSTICE RUTLEDGE also dissented in an opinion in which MR. JUSTICE MURPHY joined.]

#### NOTES

1. Petitioners sought equitable relief in a federal district court to prevent the use in state criminal proceedings then pending of evidence alleged to have been seized by state officers in violation of the Fourth Amendment as embodied in the Fourteenth Amendment. The suit was brought under the Civil Rights Act (8 U. S. C. § 43; now 42 U. S. C. § 1983; F. C. A. 42 § 1983) which provides for redress against anyone who, acting under color of state law, subjects a person to the deprivation of rights secured by the Constitution. In affirming denial of relief the Supreme Court, through Mr. Justice Frankfurter, said that federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. No irreparable injury, clear and imminent, was threatened here. "At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey courts. Such a conviction, we have held, would not deprive them of due process of law" (citing *Wolf v. Colorado*). Justices Black and Clark concurred in the result. Mr. Justice Douglas dissented on the ground that evidence obtained as a result of an unreasonable search and seizure should be excluded from state as well as federal trials. "To hold first that the evidence may be admitted and second that its use may not be enjoined is to make the Fourth Amendment an empty and hollow guarantee so far as state prosecutions are concerned." *Stefanelli v. Minard*, 342 U. S. 117, 96 L. ed. 138, 72 Sup. Ct. 118 (1951).

2. Applying the rule of *Wolf v. Colorado* and distinguishing *Rochin v. California*, the Supreme Court affirmed a conviction for violating anti-gambling laws of California, where evidence was introduced at the trial of defendant's federal wagering tax stamp, his application therefor, and certain other evidence obtained through the following means: The police and their agents first made a key to defendant's front door. Then they bored a hole in the roof of his house. Using the key they entered the house, installed a microphone, and attached it to a wire which ran through the hole in the roof to a nearby garage where officers listened in relays. Twice more they used the key to enter the house in order to adjust the microphone. First they moved it into the bedroom where defendant and his wife slept. Next, they put the microphone into the bedroom closet. Then they used the key to enter the house to arrest the suspect. They had no search warrant; but they ransacked the house. There was no "opinion of the court." Chief Justice Warren and Justices Reed and Minton joined in Justice Jackson's opinion announcing the judgment of the court; Justice Clark

concurrent in the result; Justices Black, Douglas, Frankfurter and Burton dissented, but for varying reasons. *Irvine v. California*, 347 U. S. 128, 98 L. ed. 561, 74 Sup. Ct. 381 (1954).

3. For a discussion of the way in which the search and seizure provision of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment have been read together in Supreme Court decisions and jointly support an important segment of constitutional law, see Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 191 (1930), 2 *Selected Essays on Constitutional Law* (1938), 1398. The federal rule of exclusion is now incorporated in Rule 41 (e) of the Federal Rules of Criminal Procedure, 18 U. S. C. § 3771 note; F. C. A. Rules c. 2. State and federal decisions involving the admissibility of evidence illegally obtained are collected in Wigmore, *Evidence* (3d ed. 1940), §§ 2183-2184. See also 150 A. L. R. 566 (1944), supplementing several earlier annotations. Among the many articles dealing with various problems related to searches and seizures the following are recent and timely: Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 Iowa L. Rev. 472 (1948); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?* 25 Ind. L. J. 259 (1950); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1 (1950); Ramsey, *Acquisition of Evidence by Search and Seizure*, 47 Mich. L. Rev. 1137 (1949); Farrelly, *Searches and Seizures During the Truman Era*, 25 So. Cal. L. Rev. 1 (1951); Rudd, *Present Significance of Constitutional Guarantees Against Unreasonable Searches and Seizures*, 18 U. of Cin. L. Rev. 387 (1949).

### UNITED STATES v. JEFFERS.

Supreme Court of the United States, 1951.  
342 U. S. 48, 96 L. ed. 59, 72 Sup. Ct. 93.

MR. JUSTICE CLARK delivered the opinion of the Court.

Here we are faced with troublesome questions as to the exclusion from evidence, on motion of the accused, of contraband narcotics claimed by him which were seized on the premises of other persons in the course of a search without a warrant. On the basis of the seized narcotics, the accused, respondent here, was convicted of violation of the narcotics laws, 26 U. S. C. § 2553(a) [F. C. A. 26 § 2553(a)], and 21 U. S. C. § 174 [F. C. A. 21 § 174]. Prior to trial the District Court had denied respondent's motion to suppress, as evidence at the trial, the property seized. The Court of Appeals reversed the conviction by a divided court, 88 U. S. App. D. C. 58, 187 F. (2d) 498. Since a determination of the question is important in the administration of criminal justice, we brought the case here.

The evidence showed that one Roberts had come to the Dunbar Hotel in the District of Columbia on Monday, September 12, 1949, at about 3 p. m., sought out the house detective Scott, and offered him \$500 to let him into a room in the hotel occupied by respondent's two aunts, the Misses Jeffries. Roberts told Scott that respondent had "some stuff stashed" in the room. The house detective told Roberts to call back later in the evening and he would see about it. He then immediately

reported the incident to Lieut. Karper, in charge of the narcotics squad of the Metropolitan Police, who came to the hotel about 4 p. m. Karper went with Scott to the room occupied by the Misses Jeffries. When there was no answer to their knock on the door the two officers then went to the assistant manager and obtained a key to the room. Although neither officer had either a search or an arrest warrant they unlocked the door, entered the room and in the absence of the Misses Jeffries as well as the respondent, proceeded to conduct a detailed search thereof. On the top shelf of a closet they discovered a pasteboard box containing 19 bottles of cocaine, of which only two had U. S. tax stamps attached, and one bottle of codeine, also without stamps. The bottles were seized and taken to Scott's office where Lieut. Karper telephoned the federal narcotics agent and upon the latter's arrival turned the seized articles over to him. Respondent was arrested the following day on the charges before us, at which time he claimed ownership of the narcotics seized.

It appeared from the evidence at the pretrial hearing that the Misses Jeffries had given respondent a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes. They had not given him permission to store narcotics there and had no knowledge any were so stored. The hotel records reflected that the room was assigned to and paid for by them alone.

We agree with the Court of Appeals that the seizure was made in violation of the Fourth Amendment and on motion of respondent its fruitage should have been excluded as evidence on his trial.

The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both "houses" and "effects." Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See *Weeks v. United States*, 232 U. S. 383; *Agnello v. United States*, 269 U. S. 20. Only where incident to a valid arrest, *United States v. Rabinowitz*, 339 U. S. 56, or in "exceptional circumstances," *Johnson v. United States*, 333 U. S. 10, may an exemption lie and then the burden is on those seeking the exemption to show the need for it, *McDonald v. United States*, 335 U. S. 451, 456. In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. *Johnson v. United States*, *supra*. Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters in their own hands and invaded the security of the people against unreasonable search and seizure.

The law does not prohibit every entry, without a warrant, into a hotel room. Circumstances might make exceptions and certainly implied or express permission is given to such persons as maids, janitors or repair men in the performance of their duties. But here the Government admits that the search of the hotel room, as to the Misses Jeffries, was

unlawful. They were not even present when the entry, search or seizure were conducted; nor were exceptional circumstances present to justify the action of the officers. There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized. In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door. Instead, in entering the room and making the search for the sole purpose of seizing respondent's narcotics, the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted surreptitiously and by means denounced as criminal.

The Government argues, however, that the search did not invade respondent's privacy and he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right. The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein.

It is urgently contended by the Government that no property rights within the meaning of the Fourth Amendment exist in the narcotics seized here because they are contraband goods in which Congress has declared that "no property rights shall exist." The Government made the same contention in *Trupiano v. United States*, 334 U. S. 699. This Court disposed of the contention saying: "It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. But since this property was contraband, they have no right to have it returned to them."

The same section declaring that "no property rights shall exist" in contraband goods provides for the issuance of search warrants "for the seizure" of such property. The Government's view in *Trupiano* was that the latter provision applies "when the entry must be made to seize"; but not "where, after a lawful entry for *another purpose*, the contraband property is before the eyes of the enforcing officers." This construction would make it necessary for the officers to have a search warrant here. We are of the opinion that Congress in abrogating property rights in such goods merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment. See *In re Fried*, 2 Cir., 161 F. (2d) 453.

Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial. Affirmed.

MR. CHIEF JUSTICE VINSON and MR. JUSTICE REED dissent.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

#### NOTES

1. It is only "unreasonable" searches and seizures that are prohibited by the Fourth Amendment. The Supreme Court has taken the view that the test of reasonableness cannot be stated in rigid and absolute terms but that each case is to be decided on its own facts and circumstances. The Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. The legality of a search and seizure incident to a lawful arrest has long been recognized both in federal and state law enforcement procedures. In many recent Supreme Court decisions the crucial issue has been whether the search and seizure in question, made without a warrant, could be justified on this ground. The three cases summarized below are typical. For a discussion of additional cases see the annotation in 94 L. ed. 671 (1950).

In *Harris v. United States*, 331 U. S. 145, 91 L. ed. 1399, 67 Sup. Ct. 1098 (1947) defendant was charged with two federal offenses involved in forging and cashing a check. Five FBI agents, armed with valid warrants of arrest, went to defendant's apartment and arrested him. Following the arrest, which took place in the living room, the agents searched the entire apartment for approximately five hours. The object of their search was to find two stolen canceled checks which were thought to have been used in effecting the forgery, as well as any other means that might have been employed for this purpose. Near the end of the search, in a bedroom bureau drawer, a sealed envelope was discovered containing classification cards and registration certificates used in the administration of the Selective Service Act of 1940. Defendant was convicted of illegal possession of these cards, in violation of this statute. The Supreme Court, affirming the conviction, held that the search and seizure were lawful as an incident to a valid arrest. They were not rendered invalid by the fact that a dwelling place, instead of business premises, was subjected to search or because the search extended beyond the room in which defendant was arrested. Nor did it matter that the draft cards were not related to the crimes for which defendant was arrested, since they were property of the United States in his illegal custody. Justices Frankfurter, Murphy, Jackson and Rutledge dissented.

In *Johnson v. United States*, 333 U. S. 10, 92 L. ed. 436, 68 Sup. Ct. 367 (1948), a police officer, accompanied by federal narcotics agents, smelling burning opium, knocked on the door of defendant's room in a hotel, announcing themselves as officers. Upon admission to the room the officers placed defendant under arrest. A search of the premises turned up incriminating opium and smoking apparatus warm from recent use. The government defended the legality of the search as incident to a lawful arrest. The evidence was admitted over defendant's objection at the trial and defendant was convicted of violating federal narcotic laws. The Supreme Court held that the evidence obtained by the search should have been suppressed, since the search was made without a warrant and was not justifiable as an incident of a legal arrest. Here the government was obliged to justify the arrest not on the smell of the opium before entry, but on the knowledge that defendant was alone in the room, gained only after entry. This attempted justification of the arrest by the search and the

search by the arrest was held to be fallacious. The court conceded that, at the time entry was demanded, the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. But it held unjustified the contention that evidence sufficient to support a magistrate's issuance of a search warrant would legalize the officers' search without a warrant. Chief Justice Vinson and Justices Black, Reed and Burton dissented.

In *United States v. Rabinowitz*, 339 U. S. 56, 94 L. ed. 653, 70 Sup. Ct. 430 (1950) federal officers, armed with a valid warrant for the arrest of defendant, charged with selling and having in his possession forged and altered government stamps, arrested him at his place of business and thereupon searched, without a warrant, the desk, safe, and file cabinets therein, from which they seized a number of such stamps. The evidence thus obtained was, over the accused's timely objections, admitted at his trial and he was convicted. The court said that here the officers had a warrant for arrest which, as far as could be ascertained, was broad enough to cover the crime of possessing the stamps as well as selling them. But even if the warrant were not sufficient to authorize arrest for possession, the arrest was nevertheless valid because the officers had probable cause to believe that a felony was being committed in their presence. Overruling *Trupiano v. United States*, 334 U. S. 699, 92 L. ed. 1663, 68 Sup. Ct. 1229 (1948), the court held that a search without a warrant does not violate the constitutional prohibition merely because the officers who conducted it failed to procure a search warrant, although they had time to do so, since the legality of such a search turns upon its reasonableness, under all the circumstances, and not upon the practicability of procuring a search warrant. "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search." Justices Frankfurter and Jackson dissented in an opinion which contains a valuable review of the cases. Justice Black also dissented and Justice Douglas did not participate.

2. In *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. 280, 39 A. L. R. 790 (1925) the court sustained a search without a warrant of an automobile where the officer making it had reasonable or probable cause to believe that it contained contraband goods being illegally transported. In a recent case, *United States v. Di Re*, 332 U. S. 581, 92 L. ed. 210, 68 Sup. Ct. 222 (1948), the court refused to expand the ruling in the *Carroll* case to include the right to search the person of an occupant of the car where there were no reasonable grounds for belief that he was implicated in the illegal transactions occurring in the car. The court pointed out that if the government had procured a warrant for search of the car only it could not have claimed the right to search the occupants thereof as an incident to its execution. Consequently, no greater latitude should exist to search the occupants in the absence of a warrant. "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." Chief Justice Vinson and Mr. Justice Black dissented.

3. In *Olmstead v. United States*, 277 U. S. 438, 72 L. ed. 944, 48 Sup. Ct. 564, 66 A. L. R. 376 (1928), the court (Justices Holmes, Brandeis, Butler and Stone dissenting) held that the tapping of a person's telephone wires by federal officers does not constitute an unreasonable search or seizure within the meaning of the Fourth Amendment, and that the use of evidence so obtained is not in violation of the self-incrimination provision of the Fifth Amendment. The Federal Communications Act of 1934, however, contains a provision (47 U. S. C. § 605) to the effect that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." In *Nardone v. United States*, 302 U. S. 379, 82 L. ed. 314, 58 Sup. Ct.

275 (1937) the court held that this section forbade wiretapping by federal officers as well as by others and rendered inadmissible in a federal criminal trial evidence of federal officers as to an interstate communication intercepted by tapping telephone wires.

Subsequent decisions, however, have been less hostile to the use of evidence secured as a result of wiretapping. In *Goldstein v. United States*, 316 U. S. 114, 86 L. ed. 1312, 62 Sup. Ct. 1000 (1942), co-conspirators of defendants were induced to confess and turn state's evidence when confronted with intercepted telephone messages, but none of the defendants were parties to the intercepted conversations. In upholding the conviction, the court invoked the rule that one not the victim of an unconstitutional search and seizure has no standing in court to object to the introduction in evidence of that which was seized. Here the testimony of the co-conspirators was not rendered inadmissible at the trial of defendants, who were not parties to the intercepted messages, even though the use made of the communications to induce the parties to them to testify was held to be a violation of the federal statute. Mr. Justice Murphy, joined by Chief Justice Stone and Mr. Justice Frankfurter, dissented. In *Goldman v. United States*, 316 U. S. 129, 86 L. ed. 1322, 62 Sup. Ct. 993 (1942) the court held that the use of a detectaphone by federal agents to listen to a conversation in an adjoining room between persons suspected of crime is not a violation of the Fourth Amendment. Nor did the overhearing and divulgence of what was said into a telephone receiver violate the statutory prohibition. In *On Lee v. United States*, 343 U. S. 747, 96 L. ed. 1270, 72 Sup. Ct. 967 (1952) the use in a federal criminal prosecution of testimony as to damaging admissions by the defendant in a conversation on the premises of the defendant which the witness, outside these premises, was enabled to overhear by a radio transmitter concealed on the person of the other party to the conversation, was held not to infringe the Fourth Amendment or the federal statute. The court further refused to exclude the testimony in the exercise of its supervisory authority over criminal justice in the federal courts. Justices Black, Frankfurter, Douglas and Burton dissented. And in *Schwartz v. Texas*, 344 U. S. 199, 97 L. ed. 231, 73 Sup. Ct. 232 (1952) it was held that the prohibition of the federal statute did not render inadmissible evidence obtained in violation thereof in a state criminal trial. The court said that it did not believe that Congress intended to impose a rule of evidence on the state courts, and it was unnecessary to decide whether it had the power to do so. The federal cases on the use of wiretapping, as affected by the Federal Communications Act, are collected in 97 L. ed. 237 (1953). For a recent discussion see Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165 (1952).

### UNITED STATES v. L. COHEN GROCERY CO.

Supreme Court of the United States, 1921.

255 U. S. 81, 65 L. ed. 516, 41 Sup. Ct. 298, 14 A. L. R. 1045.

In error to the District Court of the United States for the eastern district of Missouri to review a judgment which quashed an indictment for charging excessive prices for necessities.

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court.

Required on this direct appeal to decide whether Congress under the Constitution had authority to adopt section 4 of the Lever Act as re-enacted in 1919, we reproduce the section so far as relevant (Act Oct. 22, 1919, c. 80, § 2, 41 Stat. 297):

"That it is hereby made unlawful for any person willfully \* \* \* to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person \* \* \* (e) to exact excessive prices for any necessities. \* \* \* Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$5,000 or be imprisoned for not more than two years, or both. \* \* \*

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the act enumerated persons or classes of persons engaged in agricultural or similar pursuits. \* \* \*

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessities in the city of St. Louis, was charged with violating this section by willfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary; the specification in the first count being a sale for \$10.07 of about 50 pounds of sugar, and that in the second, of a 100-pound bag of sugar for \$19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the Fifth and Sixth Amendments, which it had under consideration; that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

"Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country. \* \* \*

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The indictment was therefore quashed. \* \* \*

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "that it is hereby made unlawful for any person willfully \* \* \* to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. \* \* \* And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. *United States v. Reese*, 92 U. S. 214, 219-220; *United States v. Brewer*, 139 U. S. 278, 288; *Todd v. United States*, 158 U. S. 278, 282. \* \* \*

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that

we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in the result.

#### NOTES

1. The requirement that penal statutes shall not be phrased in such vague and indefinite terms as will fail to supply an ascertainable standard of guilt or innocence has been enforced in many cases. The due process clause of the Fourteenth Amendment imposes upon the states the same requirement as to definiteness that the Fifth and Sixth Amendments impose upon Congress. Recent cases in which this requirement was considered include *Gorin v. United States*, 312 U. S. 19, 85 L. ed. 488, 61 Sup. Ct. 429 (1941) (summarizing many prior decisions); *Screws v. United States*, 325 U. S. 91, 89 L. ed. 1495, 65 Sup. Ct. 1031, 162 A. L. R. 1330 (1945); *Musser v. Utah*, 333 U. S. 95, 92 L. ed. 562, 68 Sup. Ct. 397 (1948); *Winters v. New York*, 333 U. S. 507, 92 L. ed. 840, 68 Sup. Ct. 665 (1948); *United States v. Petrillo*, 332 U. S. 1, 91 L. ed. 1877, 67 Sup. Ct. 1538 (1947); *Jordan v. De George*, 341 U. S. 223, 95 L. ed. 886, 71 Sup. Ct. 703 (1951); *Boyce Motor Lines v. United States*, 342 U. S. 337, 96 L. ed. 367, 72 Sup. Ct. 329 (1952); *United States v. Cardiff*, 344 U. S. 174, 97 L. ed. 200, 73 Sup. Ct. 189 (1952); *United States v. Kahriger*, 345 U. S. 22, 97 L. ed. 754, 73 Sup. Ct. 510 (1953); *United States v. Harriss*, 347 U. S. 612, 98 L. ed. 989, 74 Sup. Ct. 808 (1954). Many cases are discussed in the annotation in 96 L. ed. 374 (1952). See also, *Aigler, Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831 (1923); *Note*, 23 Ind. L. J. 272 (1948).

2. Statutory presumptions usually take the form of legislation providing that proof of one fact shall constitute prima facie evidence of some other fact or facts. For such presumptions to meet the yardstick of due process, not only must there be a rational connection between the fact proved and the fact presumed, but the inference must be a reasonably probable one and must not be conclusive of the rights of the person against whom it is raised. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the point to which the presumption relates. See, for example, *Western & A. R. Co. v. Henderson*, 279 U. S. 639, 73 L. ed. 884, 49 Sup. Ct. 445 (1929) (invalidating statute providing that a railroad company shall be liable for damages to persons or property by the running of locomotives unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company); *Manley v. Georgia*, 279 U. S. 1, 73 L. ed. 575, 49 Sup. Ct. 215 (1929) (invalidating statute making directors criminally liable for insolvency of a bank, with the burden of repelling statutory presumption of fraud by affirmatively showing that the business of the bank was properly administered); *Tot v. United States*, 319 U. S. 463, 87 L. ed. 1519, 63 Sup. Ct. 1241 (1943) (invalidating statutory declaration that from prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to the effective date of the statute). See *McCormick, The Validity of Statutory Presumptions of Crime Under the Federal Constitution*, 22 Tex. L. Rev. 75 (1943).

## CHAPTER VIII

### CONSTITUTIONAL LIMITATIONS: DUE PROCESS OF LAW AS TO THE SUBSTANCE OR PURPOSE OF LEGISLATION

#### Section 1.—The Scope of the Police Power in its Relation to Due Process.

##### COMMONWEALTH v. ALGER.

Supreme Judicial Court of Massachusetts, 1851.  
7 Cush. 53, 61 Mass. 53.

[The defendant was convicted for violation of statutes forbidding the building of wharves beyond harbor lines established by one of the statutes. By the agreed statement of facts the defendant built his wharf on his own flatland, not beyond low water-mark, and although it extended beyond the statutory line, it did not interfere with navigation. The case was reserved for the opinion of the Supreme Judicial Court on questions of law.]

SHAW, C. J., delivered the opinion of the Court. \* \* \*

Assuming, then, that the defendant was owner in fee of the soil and flats upon which the wharf in question was built, it becomes necessary to inquire whether it was competent for the legislature to pass the Acts establishing the harbor lines, and what is the legal validity and effect of those Acts. \* \* \*

The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the Commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others, having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other

social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *Sic utere tuo, ut alienum non laedas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the

principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers. \* \* \*

And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the seashore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different. In respect to land lying in the interior, and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious. But the circumstances are entirely different in regard to the seashore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value. \* \* \*

Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner, or any other person, to respect such rights, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties. \* \* \*

But in reference to the present case, and to the Act of the Legislature, establishing lines in the harbor, beyond which private proprietors are prohibited from building wharves, it is urged that such a restraint upon the estate of an individual, debarring him to some extent from the most beneficial use of it, is in effect taking his estate. If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more

formidable. But we are to consider the subject-matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

But of this the legislature must judge. Having once come to the conclusion that a case exists, in which it is competent for the legislature to make a law on the subject, it is for them, under a high sense of duty to the public and to individuals, with a sacred regard to the rights of property and all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property, than are in their judgment strictly necessary to preserve and protect the rights of others. \* \* \*

In regard to the other suggestion, that it is found by the case that the particular wharf of Mr. Alger did not obstruct or impede navigation, it is proper to say, that if we are right in principle, we are bound to hold that this circumstance can afford no defence. A consideration of this fact illustrates the principles we have been discussing. The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide-water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration (the expediency and necessity of defining and securing the rights of the public), which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit.

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And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the seashore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different. In respect to land lying in the interior, and used for agricultural purposes, there is little occasion to impose any restraint upon the absolute dominion of the owner, because such restraint is not necessary to prevent it from being injurious. But the circumstances are entirely different in regard to the seashore, which lies between the sea, admitted to be common to all, and the use of which is of vast importance to the public, and ports and places, without access to which, the use of the sea for navigation would be of little value. \* \* \*

Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner, or any other person, to respect such rights, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties. \* \* \*

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formidable. But we are to consider the subject-matter, to which such restraint applies. The value of this species of estate, that of shore and flats, consists mainly in the means it affords of building wharves from the upland towards deep water, to place merchandise and build wharves upon, and principally to afford access, to vessels requiring considerable depth of water, from the sea to suitable landings. Now, if along a shore where there are flats of considerable extent, one were restrained to a certain length, whilst others were allowed to extend further, the damage might be great. So if one were allowed to extend, and the coterminous proprietors adjacent were restrained, it would be obviously more injurious. The one extended would stop or check the current along the others, cause mud to accumulate near them, and thus render the water shoal at those wharves. But where all are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.

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On the whole, the court are of opinion that the Act fixing a line within the harbor of Boston, beyond which no riparian proprietor should erect a wharf or other permanent structure, although to some extent it prohibited him from building such structure on flats of which he owned the fee, was a constitutional law, and one which it was competent for the legislature to make; that it was binding on the defendant, and rendered him obnoxious to its penalties, if he violated its provisions.

## NOTES

1. The opinion of Chief Justice Shaw in this celebrated case contains one of the earliest judicial discussions of the meaning and scope of the police power. Perhaps the chief significance of the decision lies in the apparent assumption of the court that some apology must be found for discovering that the powers of a legislature are extensive. That there are limits to such powers, however, seems to be assumed, though not definitely disclosed in the opinion. It has been supposed that Chief Justice Shaw's thinking may have been influenced by the peculiar terms in which the Constitution of Massachusetts made one of its grants of power to the legislature: "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances \* \* \*; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth. \* \* \*" Was there an implication here that the legislature must not pass unreasonable laws? Or does the passage make the legislators judges of the reasonableness of their own enactments? It seems probable that the Chief Justice merely shared the view common to judges elsewhere that there were limitations on legislative power to be found outside of the provisions of a constitution. It should be noted that he, like many other judges of the period, did not assert that such limitations were to be found in the "law of the land" clause, the form that the due process clause took in the Massachusetts Constitution. It should be noted also that the grant of legislative powers made in other state constitutions of that day was expressed in no such limiting phraseology.

2. Compare the following judicial pronouncements on the meaning and scope of the police power:

"State police in its widest sense comprehends the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to everyone the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others." Mr. Justice Clifford, dissenting, in *Tennessee v. Davis*, 100 U. S. 257, 300, 25 L. ed. 648 (1880).

"What are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States." Mr. Chief Justice Taney in *License Cases*, 5 How. 504, 583, 12 L. ed. 256 (1847).

"That there is a power, sometimes called the police power, which has never been surrendered by the states, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. *Gibbons v. Ogden*, 9 Wheat. 1, 203. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27, 31. As thus defined, we may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land." Mr. Justice Harlan, in *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing Mfg. Co.*, 115 U. S. 650, 661, 29 L. ed. 516, 6 Sup. Ct. 252 (1885).

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. \* \* \* But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Mr. Justice Field, in *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 5 Sup. Ct. 357 (1885).

3. On the character and limitations of governmental power over property and business, see generally, Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 Mich. L. Rev. 737 (1922), 2 Selected Essays on Constitutional Law (1938), 60; Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943 (1927), 2 Selected Essays on Constitutional Law (1938), 94; Hamilton, *Property—According to Locke*, 41 Yale L. J. 864 (1932), 2 Selected Essays on Constitutional Law (1938), 115. For a recent study of the function of the Supreme Court as the "creator of fundamental law" in its adjudication of due process cases, see Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 Corn. L. Q. 561 (1954).

### MUGLER v. KANSAS.

Supreme Court of the United States, 1887.  
123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. 273.

[Mugler was tried and convicted upon two separate prosecutions, in Kansas, in one for selling beer and in the other for manufacturing beer, in violation of a Kansas statute, enacted in 1881, which prohibited the manufacture or sale of intoxicating liquor in the state except for medical, scientific and mechanical uses. He built and owned the brewery in which the beer was made, before the statute was enacted. The Supreme Court of Kansas sustained each conviction,

and writs of error were taken. The cases were considered together in the United States Supreme Court.]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

That legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this Court, rendered before and since the adoption of the Fourteenth Amendment; to some of which, in view of questions to be presently considered, it will be well to refer. \* \* \*

It is, however, contended, that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the state and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the state may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn v. Illinois*, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding

only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. \* \* \*

The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's

own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law making power, upon reasonable grounds, declares to be prejudicial to the general welfare. \* \* \*

It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the states intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. \* \* \*

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking

or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. \* \* \* Judgments affirmed.

### SAMUELS v. McCURDY.

Supreme Court of the United States, 1925.

267 U. S. 188, 69 L. ed. 568, 45 Sup. Ct. 264, 37 A. L. R. 1378.

[Samuels filed a petition in the Superior Court of DeKalb County, Georgia, for an injunction to restrain the sheriff from destroying a large quantity of whiskeys, wines, beer, cordials and liquors which under a search warrant the latter had carried away from Samuels' residence. The sheriff acted under Georgia statutes of 1915 and 1917 which declared it unlawful for any person to have or possess any intoxicating liquor "whether intended for personal use or otherwise," except for medicinal, mechanical or sacramental purposes on special permits, and authorized seizure and destruction of liquor unlawfully kept. The petition averred that the liquor seized had been acquired by Samuels in manners that were lawful at the time of acquisition and were kept by him for the use of his family and friends at his own

home. A general demurrer to the petition was sustained and the case dismissed. The Supreme Court of Georgia affirmed the judgment and this writ of error was taken.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.  
\* \* \*

First. This law is not an *ex post facto* law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. \* \* \*

Second. Does the seizure of this liquor and its destruction deprive the plaintiff in error of his property without due process of law, in violation of the Fourteenth Amendment?

In *Crane v. Campbell*, 245 U. S. 304, Crane was arrested for having in his possession a bottle of whiskey for his own use, and not for the purpose of giving away or selling the same to any person. This was under a provision of the statute of Idaho that it should be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors. It was held that the law was within the police power of the state. \* \* \*

The Court pointed out that as the state had the power to prohibit, it might adopt such measures as were reasonably appropriate or needful to render exercise of that power effective; and that considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, the court was unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose, that the right to hold intoxicating liquor for personal use was not one of those fundamental privileges of a citizen of the United States which no state could abridge, and that a contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. It did not appear in that case when the liquor seized had been acquired, but presumably after the prohibitory act.

In *Barbour v. Georgia*, 249 U. S. 454, it was held that the Georgia prohibitory law, approved November 18, 1915, but which did not become effective until May 1, 1916, was not invalid under the Fourteenth Amendment when applied to the possession of liquor by one who had acquired it after the approval of the law and before it became effective.

These cases it is said do not apply, because the liquor here was lawfully acquired by Samuels before the Act of 1917 making it unlawful for one to be possessed of liquor in his residence for use of his family and his guests. \* \* \*

[*Mugler v. Kansas* is here stated and quotations made from the opinion.]

The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The state has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom its use would demoralize and to avoid the abuses which follow in its train. Accordingly laws have been enacted by the states, and sustained by this court, by which it has been made illegal to manufacture liquor for one's own use or for another's, to transport it or to sell it or to give it away to others. The legislature has this power whether it affects liquor lawfully acquired before the prohibition or not. Without compensation it may thus seek to reduce the drinking of liquor. It is obvious that if men are permitted to maintain liquor in their possession, though only for their own consumption, there is danger of its becoming accessible to others. Legislation making possession unlawful is therefore within the police power of the states as a reasonable mode of reducing the evils of drunkenness, as we have seen in the Crane and Barbour cases. The only question which arises is whether for the shrunken opportunity of the possessor of liquor who acquired it before the law, to use it only for his own consumption, the state must make compensation. By valid laws, his property rights have been so far reduced that it would be difficult to measure their value. That which had the qualities of property has, by successive provisions of law in the interest of all, been losing its qualities as property. For many years, every one who has made or stored liquor has known that it was a kind of property which because of its possible vicious uses might be denied by the state the character and attributes as such; that legislation calculated to suppress its use in the interest of public health and morality was lawful and possible, and this without compensation. Why should compensation be made now for the mere remnant of the original right if nothing was paid for the loss of the right to sell the liquor, give it away or transport it? The necessity for its destruction is claimed under the same police power to be for the public betterment as that which authorized its previous restrictions. \* \* \*

Finally, it is said that the petitioner here has no day in court provided by the law, and therefore that in this respect the liquors have been taken from him without due process. \* \* \* As a search warrant issued the seizure was presumably valid. The law provides for an order of destruction by a court, but it does not provide for notice to the previous possessor of the liquor and a hearing before the order is made. Under the circumstances prima facie the liquor existed contrary to law and it was for the possessor to prove the very narrow exceptions under which he could retain it as lawful. If he desired to try the validity of the seizure or the existence of the exception by which his possession could be made to appear legal, he could resort to

suit to obtain possession and to enjoin the destruction under the Georgia law, as he has done in this case. This under the circumstances, it seems to us, constitutes sufficient process of law under the federal Constitution as respects one in his situation. \* \* \*

Judgment affirmed.

[Mr. JUSTICE BUTLER delivered a dissenting opinion.]

#### NOTE

1. A state may prohibit the sale of malt beverages without alcoholic content because a legislature may reasonably believe that this is necessary to effective enforcement of its statutes against the sale of intoxicants. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. 44 (1912).

### POWELL v. PENNSYLVANIA.

Supreme Court of the United States, 1888.

127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. 992.

[Powell was indicted for selling oleomargarine in violation of a Pennsylvania statute of 1885 which made it a criminal offense to manufacture, sell, offer for sale, or keep for sale any article designed to take the place of butter, made from any oleaginous substance other than unadulterated milk or cream. For the purpose of the trial it was agreed that the two packages sold were sold and bought as butterine and not as butter and were plainly marked, "Oleomargarine Butter." The defendant offered evidence to show that the article sold was made of pure animal fats; that it contained all the elements of butter, including butterine though in a smaller proportion than butter contains; that butterine only gives flavor to butter and has nothing to do with its wholesomeness, and that the process of manufacture was clean and wholesome. He also offered evidence that the packages sold had been owned by him before the statute was enacted. This evidence was excluded as irrelevant. The State Supreme Court sustained a conviction, and now on writ of error:]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation

to those objects. *Mugler v. Kansas*, 123 U. S. 623, 661. The Court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The Court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. \* \* \*

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." *Yick Wo v. Hopkins*, 118 U. S. 370.

The case before us belongs to the latter class. The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the

record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the Court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land.

\* \* \*

Judgment affirmed.

[MR. JUSTICE FIELD delivered a dissenting opinion.]

#### NOTES

1. A state statute of Washington levying an excise tax of fifteen cents per pound on all butter substitutes sold within the state was upheld in *A. Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L. ed. 1109, 54 Sup. Ct. 599 (1934), as against the claim, *inter alia*, that it violated due process of law. The court said that "except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution" and that consequently "no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment."

2. In *Price v. Illinois*, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. 892 (1915) it was held that a state might validly prohibit the sale of food preservatives containing boric acid although the harmful effects of such acid were "debatable." The power derived from the right to protect the public health and unless "palpably unreasonable and arbitrary" must be sustained. "If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be

superseded by the verdict of a jury upon the issue which the legislature has decided."

### WEAVER v. PALMER BROS. CO.

Supreme Court of the United States, 1926.  
270 U. S. 402, 70 L. ed. 654, 46 Sup. Ct. 320.

Appeal from a decree of the District Court of the United States for the Western District of Pennsylvania granting an injunction to restrain the defendant (appellant), an official of Pennsylvania, from enforcing against the plaintiff (appellee), a manufacturer and seller of bedding, a statute of Pennsylvania in so far as the statute forbade the use of shoddy in the manufacture of comfortables. The statute defined shoddy as any material which has been spun into yarn, knit or woven into fabric, and subsequently cut up, torn up, broken up or ground up.

MR. JUSTICE BUTLER delivered the opinion of the Court. \* \* \*

The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. *Penna. Coal Co. v. Mahon*, 260 U. S. 393, 413. Invalidity may be shown by things which will be judicially noticed (*Quong Wing v. Kirkendall*, 223 U. S. 59, 64) or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See *Minnesota Rate Cases*, 230 U. S. 352, 452.

For many years prior to the passage of the act comfortables made in appellee's factories had been sold in Pennsylvania. In 1923 its business in that state exceeded \$558,000, of which more than \$188,000 was for comfortables filled with shoddy. About 5,000 dozens of these were filled with shoddy made of new materials, and about 3,000 dozens with secondhand shoddy. Appellee makes approximately 3,000,000 comfortables annually, and about 750,000 of these are filled with materials defined by the act as shoddy. New material from which appellee makes shoddy consists of clippings and pieces of new cloth obtained from cutting tables in garment factories; secondhand shoddy is made of secondhand garments, rags, and the like. The record shows that annually many million pounds of fabric, new and secondhand, are made into shoddy. It is used for many purposes. It is rewoven into fabric, made into pads to be used as filling material for bedding, and is used in the manufacture of blankets, clothing, underwear, hosiery, gloves, sweaters and other garments. The evidence is to the effect that practically all the woolen cloth woven in this country contains some shoddy. That used to make comfortables is a different grade from that used in the textile industry. Some used by appellee for that purpose is made of

clippings from new woolen underwear and other high grade and expensive materials. Comfortables made of secondhand shoddy sell at lower prices than those filled with other materials.

Appellant claims that, in order properly to protect health, bedding materials should be sterilized. The record shows that for the sterilization of secondhand materials from which it makes shoddy, appellee uses effective steam sterilizers. There is no controversy between the parties as to whether shoddy may be rendered harmless by disinfection or sterilization. While it is sometimes made from filthy rags, and from other materials that have been exposed to infection, it stands undisputed that all dangers to health may be eliminated by appropriate treatment at low cost. \* \* \*

There was no evidence that any sickness or disease was ever caused by the use of shoddy, and the record contains persuasive evidence, and by citation discloses the opinions of scientists eminent in fields related to public health that the transmission of disease-producing bacteria is almost entirely by immediate contact with, or close proximity to, infected persons; that such bacteria perish rapidly when separated from human or animal organisms; and that there is no probability that such bacteria or vermin likely to carry them survive after the period usually required for the gathering of the materials, the production of shoddy, and the manufacture and the shipping of comfortables. This evidence tends strongly to show that in the absence of sterilization or disinfection there would be little, if any, danger to the health of the users of comfortables filled with shoddy, new or secondhand; and confirms the conclusion that all danger from the use of shoddy may be eliminated by sterilization.

The state has wide discretion in selecting things for regulation. We need not consider whether the mere failure to forbid the use of other filling materials that are mentioned in the act is sufficient in itself to invalidate the provision prohibiting the use of shoddy, as a violation of the equal protection clause. But the number and character of the things permitted to be used in such manufacture properly may be taken into account in deciding whether the prohibition of shoddy is a reasonable and valid regulation or is arbitrary and violative of the due process clause. Shoddy-filled comfortables made by appellee are useful articles for which there is much demand; and it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden. They are to be distinguished from things that the state is deemed to have power to suppress as inherently dangerous. \* \* \*

The appellant insists that this case is ruled by *Powell v. Pennsylvania*, 127 U. S. 678. But the cases are essentially different. \* \* \*

The facts clearly distinguish this case from the *Powell* case. There it was assumed that most kinds of oleomargarine in the market were or might become injurious to health. Here it is established that steriliza-

tion eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health; and the fact that the act permits the use of numerous materials, prescribing sterilization if they are secondhand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary.

Nor can such prohibition be sustained as a measure to prevent deception. In order to ascertain whether the materials used and the finished articles conform to its requirements, the act expressly provides for inspection of the places where such articles are made, sold or kept for sale. Every article of bedding is required to bear a tag showing the materials used for filling and giving the names and addresses of makers and vendors, and bearing the word "secondhand" where there has been prior use, and giving the number of the permit for sterilizing and disinfecting where secondhand materials or feathers are used for filling. Obviously, these regulations or others that are adequate may be effectively applied to shoddy-filled articles.

The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger v. Wisconsin*, 270 U. S. 230. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. *Adams v. Tanner*, 244 U. S. 590, 596; *Meyer v. Nebraska*, 262 U. S. 390; *Burns Baking Co. v. Bryan*, 264 U. S. 504.

Decree affirmed.

MR. JUSTICE HOLMES, dissenting. If the legislature of Pennsylvania was of opinion that disease is likely to be spread by the use of unsterilized shoddy in comfortables I do not suppose that this Court would pronounce the opinion so manifestly absurd that it could not be acted upon. If we should not, then I think that we ought to assume the opinion to be right for the purpose of testing the law. The legislature may have been of opinion further that the actual practice of filling comfortables with unsterilized shoddy gathered from filthy floors was wide spread, and this again we must assume to be true. It is admitted to be impossible to distinguish the innocent from the infected product in any practicable way, when it is made up into the comfortables. On these premises, if the legislature regarded the danger as very great and inspection and tagging as inadequate remedies, it seems to me that in order to prevent the spread of disease it constitutionally could forbid any use of shoddy for bedding and upholstery. Notwithstanding the broad statement in *Schlesinger v. Wisconsin* the other day, I do not suppose that it was intended to overrule *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, and other cases to which I referred there. \* \* \*

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

## CAROLENE PRODUCTS CO. v. UNITED STATES.

Supreme Court of the United States, 1944.

323 U. S. 18, 89 L. ed. 15, 65 Sup. Ct. 1, 155 A. L. R. 1371.

MR. JUSTICE REED delivered the opinion of the Court.

The limited writ of certiorari in this case was granted to review petitioners' conviction, affirmed by the Circuit Court of Appeals, for a violation of the Filled Milk Act. The Court was moved to allow the petition in order to examine the contentions that the accused articles of food cannot, under the due process clause of the Fifth Amendment to the Constitution, be banned from commerce when these compounds are nutritionally sufficient and not "in imitation or semblance" of milk or any milk product within the meaning of the statute and are not sold as milk or a milk product.

The contentions which are raised by petitioners to avoid their conviction were not dealt with in our prior decision which upheld the act's validity upon demurrer to an earlier indictment which charged its violation. *United States v. Carolene Products Co.*, 304 U. S. 144. Since these issues are important to those affected by the act, certiorari was granted. 321 U. S. 760. Questions of due process under the Fourteenth Amendment, similar to those presented here, had arisen from state filled milk legislation with varying results. Consideration by this Court of the filled milk legislation of Kansas appears in *Sage Stores et al. v. Kansas*, 323 U. S. 32.

The facts which are undisputed are fully set out in the opinions of the District Court and the Circuit Court of Appeals. It is sufficient for our purposes to summarize them as follows. The corporate petitioner sells the products mentioned in the indictment which are manufactured for it by another corporation from skim milk, that is, milk from which a large percentage of the butterfat has been removed. The process of manufacture consists of taking natural whole milk, extracting the butterfat content and then adding cottonseed or cocoanut oil and fish liver oil, which latter oil contains vitamins A and D. The process includes pasteurization of the milk, evaporation, homogenization of the mixture and sterilization. The compound is sold under various trade names in cans of the same size and shape as those used for evaporated milk. The contents of the can are practically indistinguishable by the buying public from evaporated whole milk, but the cans are truthfully labeled to show the trade names and the ingredients.

The indictment charged the petitioner corporation and the individual petitioners, its president and vice president, with violation of the statute by making interstate shipments of the compounds contrary to Section 2. The convictions and sentences are assailed as improper on three grounds: first, that the petitioner's compounds were not covered by the rationale of the Filled Milk Act; second, that the Act did not cover the compounds because they were not "in imitation or semblance" of a

milk product; and third, that since the compounds were wholesome food products and sold without fraud, in any sense, Congress could not constitutionally prohibit their interstate shipment. \* \* \*

Third. If the Filled Milk Act is applicable to the compounds whose shipment was the basis of the indictment in this case, as we have just concluded, petitioners assert that the act, as thus applied, violates the due process clause of the Fifth Amendment. Their argument runs in this manner. Since these enriched compounds are admittedly wholesome and sold under trade names with proper labels without the commission of any fraud by petitioners on the public, Congress cannot prohibit their interstate shipment without denying to petitioners a right protected by the due process clause, the right to trade in innocent articles. They rely upon *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, and continue their protest against the refusal of the trial court to receive the evidence as to the wholesomeness of their product.

We do not need to consider the refusal of the trial court to receive evidence of the purity and wholesomeness of petitioner's products. Such evidence could be material only if the sole basis for Congressional action was impurity and unwholesomeness. Under the first point of this opinion, we have determined that the avoidance of confusion furnished a reason for the enactment of the Filled Milk Act. The trial court took judicial notice, as did the District Court of the District of Columbia, *United States v. Carolene Products Co.*, 51 F. Supp. 675, 678, 679, and as we do, of the reports of the committees of the House of Representatives and the Senate which show that other considerations than nutritional deficiencies influenced the prohibition of the shipment of filled milk in interstate commerce. The unchallenged reports as we indicated in part "First" above, furnish an adequate basis, other than unwholesomeness, for the action of Congress. The reports show that it was disputable as to whether wholesome filled milk should be excluded from commerce because of the danger of its confusion with the condensed or evaporated natural product or whether regulation would be sufficient. The power was in Congress to decide its own course. We need look no further.

*Weaver v. Palmer Bros.*, *supra*, is not to the contrary. This Court thought that under the facts of that record there was no reasonable basis for the legislative determination that the use of shoddy in comfortables was dangerous to the public health or that it offered opportunity for deception, 270 U. S. at pages 412 and 414. Therefore the prohibition of its use violated the due process clause of the Fourteenth Amendment. Sterilization, inspection and labeling were deemed to be sufficient to negative the possibility of such evils. It was pointed out in the course of the opinion, 270 U. S. at page 413, that where the possibility of evil was not negated, legislation prohibiting the sale of a wholesome article would not be invalidated. *Powell v. Pennsylvania*, 127 U. S. 678. In dealing with the evils of filled milk, Congress reached

the conclusion that labeling was not an adequate remedy for deception. On the point of the constitutionality in relation to due process of the prohibition of trade in articles which are not in themselves dangerous but which make other evils more difficult to control, such as confusion in the filled milk legislation, the Powell case is authority for the validity of Congressional action in the Filled Milk Act. It involved a sale of an article assumed to be just as good as butter but which was prohibited because of its ingredients. \* \* \*

In *Hebe Co. v. Shaw*, 248 U. S. 297, this Court in 1919 upheld the validity of an Ohio statute which prohibited the sale of condensed milk made otherwise than from whole milk against an attack under the Fourteenth Amendment. It was assumed that the compound was wholesome and it was properly labeled. The act was sustained, however, as a proper exercise of legislative power to protect the public against fraudulent substitution. \* \* \*

In the action of Congress on filled milk there is no prohibition of the shipment of an article of commerce merely because it competes with another such article which it resembles. Such would be the prohibition of the shipment of cotton or silk textiles to protect rayon or nylon or of anthracite to aid the consumption of bituminous coal or of cottonseed oil to aid the soybean industry. Here a milk product, skimmed milk, from which a valuable element—butterfat—has been removed is artificially enriched with cheaper fats and vitamins so that it is indistinguishable in the eyes of the average purchaser from whole milk products. The result is that the compound is confused with and passed off as the whole milk product in spite of proper labeling.

When Congress exercises a delegated power such as that over interstate commerce, the methods which it employs to carry out its purposes are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat. This is not shown here. The judgment is Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

#### MILLER v. SCHOENE.

Supreme Court of the United States, 1928.  
276 U. S. 272, 72 L. ed. 568, 48 Sup. Ct. 246.

MR. JUSTICE STONE delivered the opinion of the Court.

Acting under the Cedar Rust Act of Virginia, Va. Acts 1914, c. 36, as amended by Va. Acts 1920, c. 260, now embodied in Va. Code (1924) as §§ 885 to 893, defendant in error, the state entomologist, ordered the plaintiffs in error to cut down a large number of ornamental red cedar trees growing on their property, as a means of preventing the communication of a rust or plant disease with which they were infected to the apple orchards in the vicinity. The plaintiffs in error appealed

from the order to the Circuit Court of Shenandoah county which, after a hearing and a consideration of evidence, affirmed the order and allowed to plaintiffs in error \$100 to cover the expense of removal of the cedars. Neither the judgment of the court nor the statute as interpreted allows compensation for the value of the standing cedars or the decrease in the market value of the realty caused by their destruction whether considered as ornamental trees or otherwise. But they save to plaintiffs in error the privilege of using the trees when felled. On appeal the Supreme Court of Appeals of Virginia affirmed the judgment. *Miller v. State Entomologist*, 146 Va. 175. Both in the Circuit Court and the Supreme Court of Appeals plaintiffs in error challenged the constitutionality of the statute under the due process clause of the Fourteenth Amendment and the case is properly here on writ of error. Jud. Code § 237(a).

The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By § 1 it is declared to be unlawful for any person to "own, plant or keep alive and standing" on his premises any red cedar tree which is or may be the source or "host plant" of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction. Section 2 makes it the duty of the state entomologist, "upon the request in writing of ten or more reputable freeholders of any county or magisterial district, to make a preliminary investigation of the locality \* \* \* to ascertain if any cedar tree or trees \* \* \* are the source of, harbor or constitute the host plant for the said disease \* \* \* and constitute a menace to the health of any apple orchard in said locality, and that said cedar tree or trees exist within a radius of two miles of any apple orchard in said locality." If affirmative findings are so made, he is required to direct the owner in writing to destroy the trees and, in his notice, to furnish a statement of the "fact found to exist whereby it is deemed necessary or proper to destroy" the trees and to call attention to the law under which it is proposed to destroy them. Section 5 authorizes the state entomologist to destroy the trees if the owner, after being notified, fails to do so. Section 7 furnishes a mode of appealing from the order of the entomologist to the circuit court of the county, which is authorized to "hear the objections" and "pass upon all questions involved," the procedure followed in the present case.

As shown by the evidence and as recognized in other cases involving the validity of this statute, *Bowman v. Virginia State Entomologist*, 128 Va. 351; *Kelleher v. Schoene*, 14 F. (2d) 341, cedar rust is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. Its life cycle has two phases which are passed alternately as a growth on red cedar and on apple trees. It is com-

municated by spores from one to the other over a radius of at least two miles. It appears not to be communicable between trees of the same species, but only from one species to the other, and other plants seem not to be appreciably affected by it. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards.

The red cedar, aside from its ornamental use, has occasional use and value as lumber. It is indigenous to Virginia, is not cultivated or dealt in commercially on any substantial scale, and its value throughout the state is shown to be small as compared with that of the apple orchards of the state. Apple growing is one of the principal agricultural pursuits in Virginia. The apple is used there and exported in large quantities. Many millions of dollars are invested in the orchards, which furnish employment for a large portion of the population, and have induced the development of attendant railroad and cold storage facilities.

On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. \* \* \* And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. \* \* \*

We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute. \* \* \* For where, as here, the choice is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process. \* \* \*

Affirmed.

## LOUIS K. LIGGETT CO. v. BALDRIDGE.

Supreme Court of the United States, 1928.  
278 U. S. 105, 73 L. ed. 204, 49 Sup. Ct. 57.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This appeal brings here for consideration a challenge to the constitutionality of an act of the Pennsylvania legislature approved May 13, 1927, Penna. Stats., Supp. 1928, §§ 9377a-1, 9377a-2. \* \* \* The act provides that every pharmacy or drug store shall be owned only by a licensed pharmacist, and, in the case of corporations, associations and co-partnerships, requires that all the partners or members thereof shall be licensed pharmacists, with the exception that such corporations as are already organized and existing and duly authorized and empowered to do business in the state and own and conduct drug stores or pharmacies, and associations and partnerships, which, at the time of the passage of the act, still own and conduct drug stores or pharmacies, may continue to own and conduct the same.

The appellant is a Massachusetts corporation authorized to do business in Pennsylvania. At the time of the passage of the act, appellant was empowered to own and conduct and owned and thereafter continued to own and operate a number of pharmacies or drug stores at various places within the latter state. After the passage of the act, appellant purchased and took possession of two additional drug stores in that state and carried on and continues and intends to continue to carry on a retail drug business therein under the title of "drug store" or "pharmacy," including the compounding, dispensing, preparation and sale at retail of drugs, medicines, etc. The business was and is carried on through pharmacists employed by appellant and duly registered in accordance with the statutes of the state. All of the members [stockholders] of the appellant corporation are not registered pharmacists, and, in accordance with the provisions of the act, the Pennsylvania State Board of Pharmacy has refused to grant appellant a permit to carry on the business. It further appears that the state Attorney General and the District Attorney of the proper county have threatened and intend to and will prosecute appellant for its violation of the act, the penalties for which are severe and cumulative. Suit was brought to enjoin these officers from putting into effect their threats, upon the ground that the act in question contravenes the due process and equal protection clauses of the Fourteenth Amendment. It is clear from the pleadings and the record, and it is conceded, that if the act be unconstitutional as claimed, appellant is entitled to the relief prayed. *Terrace v. Thompson*, 263 U. S. 197, 215; *Ex parte Young*, 209 U. S. 123.

The court below, composed of three judges, heard the case upon the pleadings, affidavits and an agreed statement of facts, and rendered a decree denying a preliminary injunction and, upon the agreed submission of the case, a final decree dismissing the bill for want of equity.

22 F. (2d) 993. The statute was held constitutional upon the ground that there was a substantial relation to the public interest in the ownership of a drug store where prescriptions were compounded. \* \* \*

The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution. \* \* \*

A state undoubtedly may regulate the prescription, compounding of prescriptions, purchase and sale of medicines, by appropriate legislation to the extent reasonably necessary to protect the public health. And this the Pennsylvania legislature sought to do by various statutory provisions in force long before the enactment of the statute under review. Briefly stated, these provisions are: No one but a licensed physician may practice medicine or prescribe remedies for sickness; no one but a registered pharmacist lawfully may have charge of a drug store; every drug store must itself be registered, and this can only be done where the management is in charge of a registered pharmacist; stringent provision is made to prevent the possession or sale of any impure drug or any below the standard, strength, quality and purity as determined by the recognized pharmacopoeia of the United States; none but a registered pharmacist is permitted to compound physician's prescriptions; and, finally, the supervision of the foregoing matters and the enforcement of the laws in respect thereof are in the hands of the state Board of Pharmacy, which is given broad powers for these purposes.

It, therefore, will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicine; he cannot, unless he be a licensed physician, prescribe for the sick; he cannot, unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.

The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513. \* \* \*

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in

question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment. Decree reversed.

MR. JUSTICE HOLMES, dissenting.

A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. \* \* \* The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. \* \* \*

But for decisions to which I bow I should not think any conciliatory phrase necessary to justify what seems to me one of the incidents of legislative power. I think however that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.  
\* \* \*

MR. JUSTICE BRANDEIS joins in this opinion.

#### NOTE

1. In *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 1336, 37 Sup. Ct. 662, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973 (1917) a Washington statute which prohibited employment agencies from collecting fees from persons supplied with employment was held unconstitutional on the ground that it was arbitrary and oppressive, and unduly restrictive of the liberty of employment agents to engage in a useful business. Justices Holmes, McKenna, Brandeis and Clarke dissented. In *Burns Baking Co. v. Bryan*, 264 U. S. 504, 68 L. ed. 813, 44 Sup. Ct. 412, 32 A. L. R. 661 (1924) a statute fixing the weight of loaves of bread to be sold to the public for the purpose of protecting purchasers against fraud by short weights was invalidated on a finding of no real or substantial relation

between the legislative action and the end sought to be accomplished. Justices Holmes and Brandeis dissented. *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129, 34 Sup. Ct. 681, L. R. A. 1915D, 677 (1914) held invalid a Texas statute which made it a misdemeanor for any person to act as a conductor on a railroad train without having for two years prior thereto worked as a brakeman or conductor on a freight train. Justice Holmes dissented.

CHICAGO, B. & Q. R. CO. v. CHICAGO.

Supreme Court of the United States, 1897.

166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. 581.

[The City of Chicago in opening a street across the right of way of the railroad company proceeded in a local court to have determined by a jury the just compensation required by the constitution of Illinois to be paid upon taking private property for a public use. The company excepted to the jury's award of one dollar and to instructions given the jury as to the rules to be applied in ascertaining just compensation, contending that thereby it was deprived of its property without due process of law, in violation of the Fourteenth Amendment. From affirmance by the Illinois Supreme Court of a judgment in execution of this award, this writ of error was taken.]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In *Davidson v. New Orleans*, 96 U. S. 97, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See also *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403, 417. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty," Mr. Broom in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation." (p. 228.) The requirement that the property shall not be taken for public use without just compensation is but "an affirmation of a great doctrine established by the common law for the pro-

tection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." \* \* \*

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. \* \* \*

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

It remains to inquire whether the necessary effect of the proceedings in the court below was to appropriate to the public use any property right of the railroad company without compensation being made or secured to the owner. \* \* \*

[The Court further held that as to whether one dollar was a correct valuation of the easement acquired or taken by the city, that fact having been found by a jury, as required by the constitution of Illinois, no federal court could re-examine that question because of the prohibition of the Seventh Amendment of the Constitution of the United States that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

After saying: "We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was

in absolute disregard of the company's right to just compensation," the Court concluded that the instructions to the jury were correct.]

Judgment affirmed.

[MR. JUSTICE BREWER dissented but only as to the points included in the brackets above.]

## NOTES

1. The due process clause has been construed in many cases to permit a state to require railroads to eliminate highway grade crossings and similar works at their own expense. See, for example, *Erie R. Co. v. Public Utility Commission*, 254 U. S. 394, 65 L. ed. 322, 41 Sup. Ct. 169 (1921); *Lehigh Valley R. Co. v. Board of Public Utility Commissioners*, 278 U. S. 24, 73 L. ed. 161, 49 Sup. Ct. 69, 62 A. L. R. 805 (1928). The court has held, however, that a railroad could not validly be required to bear half the cost of building an underpass on a new interstate highway where the underpass was prescribed not upon safety considerations but as a part of a national system of federal aid highways for the furtherance of motor vehicle traffic, much of which consisted of motor carriers in direct competition with the railroad. *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 79 L. ed. 949, 55 Sup. Ct. 486 (1935). Nor may a pipe line company be required, without compensation, to make changes in its transmission lines necessitated by the replanning and construction of highways across its right of way. *Panhandle Eastern Pipe Line Co. v. State Highway Commission*, 294 U. S. 613, 79 L. ed. 1090, 55 Sup. Ct. 563 (1935).

2. A public drainage district may, as part of its plan to drain swamp lands, require a railroad company to bear the cost of removing and rebuilding a bridge made necessary by the deepening of the channel of a stream. The court said that "injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation." *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. 341, 4 Ann. Cas. 1175 (1906). A city ordinance was held invalid, however, which required privately owned electric public utilities to remove and relocate their poles and other property in the streets, without compensation, to afford space for the installation of a street lighting system. *Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U. S. 32, 64 L. ed. 121, 40 Sup. Ct. 76 (1919).

3. In *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 79 L. ed. 1593, 55 Sup. Ct. 854, 97 A. L. R. 1106 (1935), the Frazier-Lemke Act of 1934, providing relief for insolvent farmers by a form of bankruptcy proceeding, was held to violate the due process clause of the Fifth Amendment. The act provided that farmer-mortgagors failing to obtain a composition or extension of existing indebtedness could retain possession of the mortgaged property for five years, upon payment of a reasonable rental fee fixed by the court, with an option to purchase at an appraised or reappraised value during that period. The court said that the legislation deprived a secured creditor without compensation of substantive rights of substantial value in the specific property securing his claim and transferred them to the debtor. A revised statute of 1935 affording creditors greater protection was upheld in *Wright v. Vinton Mountain Trust Bank*, 300 U. S. 440, 81 L. ed. 736, 57 Sup. Ct. 556, 112 A. L. R. 1455 (1937).

## OMNIA COMMERCIAL CO. v. UNITED STATES.

Supreme Court of the United States, 1923.

261 U. S. 502, 67 L. ed. 773, 43 Sup. Ct. 437.

Appeal from a judgment of the Court of Claims dismissing a petition on demurrer.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant, on May 19, 1917, by assignment, became the owner of a contract, by which it acquired the right to purchase a large quantity of steel plate from the Allegheny Steel Company, of Pittsburgh, at a price under the market. The contract was of great value, and if carried out would have produced large profits.

In October, 1917, before any deliveries had been made, the United States government requisitioned the steel company's entire production of steel plate for the year 1918, and directed that company not to comply with the terms of appellant's contract, declaring that if an attempt was made to do so the entire plant of the steel company would be taken over and operated for the public use.

Appellant brought an action in the Court of Claims alleging, in addition to the foregoing, that by the orders of the government the performance of the contract by the steel company had been rendered unlawful and impossible; that the effect was to take for the public use appellant's right of priority to the steel plate expected to be produced by the steel company and thereby appropriate for public use appellant's property in the contract. As a result it alleged that it had incurred losses in a large sum which it sought to recover, as just compensation, by virtue of Article V of [the Amendments to] the Constitution. To this petition the United States interposed a demurrer, which was sustained, and the petition dismissed. From this judgment the case comes here by appeal. \* \* \*

The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 690; *Cincinnati v. Louisville & Nashville Ry. Co.*, 223 U. S. 390, 400, and if taken for public use the government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, *Bowditch v. Boston*, 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition. *Pennsylvania Coal Co., Inc. v. Mahon*, 260 U. S. 393.

There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. Contracts in this respect do not differ from other kinds of property. See *Calhoun v. Massie*, 253 U. S. 170, where an act of Congress invalidat-

ing contracts made with attorneys for compensation exceeding a certain percentage for the prosecution of claims against the government was sustained, although it had the effect of putting an end to an existing contract. \* \* \*

In *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, it was held that an act of Congress, prohibiting the issuance of free transportation by interstate common carriers, which invalidated a contract for transportation previously entered into and valid when made, did not have the effect of taking private property without compensation. The court, speaking through Mr. JUSTICE HARLAN, said (p. 484):

"It is not determinative of the present question that the commerce act as now construed will render the contract of no value for the purposes for which it was made. In *Knox v. Lee*, 12 Wall. 457, above cited, the court, referring to the Fifth Amendment, which forbids the taking of private property for public use without just compensation or due process of law, said: 'That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts.'"

The conclusion to be drawn from these and other cases which might be cited is that for consequential loss or injury resulting from lawful governmental action the law affords no remedy. The character of the power exercised is not material. *Chicago, Burlington & Quincy R. Co. v. Drainage Commissioners*, 200 U. S. 561, 583-585, 592-593. If, under any power, a contract or other property is *taken* for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable. What was here requisitioned was the future product of the steel company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, ipso facto, took the latter. This, however, is to confound the contract with its subject-matter. The essence of every executory contract is the obligation which the law imposes upon the parties to perform it. "It [the contract] may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other." *Dartmouth College v. Woodward*, 4 Wheat. 629, 656. Plainly here there was no acquisition of the obligation or the right to enforce it. If the steel company had failed to comply with the requisition, what would have been the remedy? Not enforcement of the contract, but enforcement of the statute. If the government had failed to pay for

what it got, what would have been the right of the steel company? Not to the price fixed by the contract, but to the just compensation guaranteed by the Constitution.

In exercising the power to requisition, the government dealt only with the steel company, which company thereupon became liable to deliver its product to the government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended. \* \* \*

The judgment of the court below is

Affirmed.

### JACKMAN v. ROSENBAUM CO.

Supreme Court of the United States, 1922.

260 U. S. 22, 67 L. ed. 107, 43 Sup. Ct. 9.

Error to the Supreme Court of the State of Pennsylvania.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The plaintiff in error, the original plaintiff, owned a theatre building in Pittsburgh, Pennsylvania, a wall of which went to the edge of his line. Proceeding under a statute of Pennsylvania, the defendant, owner of the adjoining land, began to build a party wall, intending to incorporate the plaintiff's wall. The city authorities decided that the latter was not safe and ordered it to be removed, which was done by the contractor employed by the defendant. The plaintiff later brought this suit. The declaration did not set up that the entry upon the plaintiff's land was unlawful, but alleged wrongful delay in completing the wall and the use of improper methods. It claimed damages for the failure to restore the plaintiff's building to the equivalent of its former condition, and for the delay, which, it was alleged, caused the plaintiff to lose the rental for a theatrical season. At the trial the plaintiff asked for a ruling that the statute relating to party walls, if interpreted to exclude the recovery of damages without proof of negligence, was contrary to the Fourteenth Amendment. This was refused, the court ruling that the defendant was not liable for damages necessarily resulting from the exercise of the right given by the statute, to build a party wall upon the line, and, more specifically, was not liable for the removal of the plaintiff's old wall. There were further questions as to whether the work was done by an independent contractor and as to negligence, on which the jury brought in a verdict for the plaintiff for \$25,000; but the Court of Common Pleas held that the party employed was an independent contractor and that the defendant was entitled to judgment *non obstante veredicto*. The Supreme Court affirmed the judgment, holding among other things that the statute imposed no liability for damages necessarily caused by building such a party wall as it permitted, and that, so construed, it did not encounter

the Fourteenth Amendment of the Constitution of the United States, 263 Pa. St. 158.

In the state court the judgment was justified by reference to the power of the state to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of what is called the police power. The exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case. *Wurts v. Hoagland*, 114 U. S. 606; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; *Noble State Bank v. Haskell*, 219 U. S. 104, 111. The Supreme Court of the state adverted also to increased safety against fire and traced the origin to the great fire in London in 1666. It is unnecessary to decide upon the adequacy of these grounds. It is enough to refer to the fact, also brought out and relied upon in the opinion below, that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn and has prevailed in the state ever since. It is illustrated by statutes concerning Philadelphia going back to 1721; 1 Dallas, Laws of Pennsylvania, 152; and by an Act of 1794 for Pittsburgh, 3 Dallas, Laws, 588, 591, referring to the Act incorporating the borough of Reading. 2 Dallas, Laws, 124, 129.

The Fourteenth Amendment, itself a historical product, did not destroy history for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U. S. 94, 104, 112. See *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U. S. 430, 434. Such words as "right" are a constant solicitation to fallacy. We say a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the landowner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

Of course a case could be imagined where the modest mutualities of simple townspeople might become something very different when extended to buildings like those of modern New York. There was a suggestion of such a difference in this case. But, although the foundations spread wide, the wall above the surface of the ground was only thirteen inches thick, or six and a half on the plaintiff's land, and as the damage complained of was a necessary incident to any such building, the question how far the liability might be extended does not

arise. It follows, as stated by the Supreme Court of Pennsylvania that "when either lot-owner builds upon his own property up to the division line, he does so with the knowledge that, in case of the erection of a party wall, that part of his building which encroaches upon the portion of the land subject to the easement will have to come down, if not suitable for incorporation into the new wall." In a case involving local history as this does, we should be slow to overrule the decision of courts steeped in the local tradition, even if we saw reasons for doubting it, which in this case we do not. Judgment affirmed.

### LAUREL HILL CEMETERY v. SAN FRANCISCO.

Supreme Court of the United States, 1910.  
216 U. S. 358, 54 L. ed. 515, 30 Sup. Ct. 301.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action to restrain the City and County of San Francisco and its officers from enforcing an ordinance forbidding the burial of the dead within the City and County limits. The allegations of the complaint are lengthy, but the material facts set forth are as follows: The plaintiff was incorporated in 1867 as a rural cemetery under a general act. The land in question had been dedicated as a burying ground, being at that time outside the city limits and a mile or two away from dwellings and business. It was conveyed to the plaintiff, and later a grant of the same was obtained from the city in consideration of \$24,139.79, which sum the city retains. The land has been used as a cemetery ever since; forty thousand lots have been sold and over two million dollars have been spent by the lot owners and other large sums by the plaintiff in preparing and embellishing the grounds. By the terms of the above-mentioned general statute the lots, after a burial in them, are inalienable and descend to the heirs of the owner, and the plaintiff is bound to apply the proceeds of sales to the improvement, embellishment and preservation of the grounds. There is land still unsold estimated to be worth \$75,000. There now are many dwellings near the cemetery, but it is alleged to be in no way injurious to health or offensive, or otherwise an interference with the enjoyment of property or life. There also is an allegation that there are within the city large tracts, some of them vacant and some of them containing several hundred acres, in several of which interments could be made more than a mile distant from any inhabitants or highway. The ordinance in question begins with a recital that "the burial of the dead within the City and County of San Francisco is dangerous to life and detrimental to the public health," and goes on to forbid such burial under a penalty of fine, imprisonment, or both. The complaint sets up that it violates Article I, § 8, and the Fourteenth Amendment of the Constitution of the United States. \* \* \*

The only question that needs to be answered, if not the only one before us, is whether the plaintiff's property is taken contrary to the Fourteenth Amendment. \* \* \*

To aid its contention and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial notice, to adopt them, and on the strength of our acceptance to declare the foundation of the ordinance a mistake and the ordinance void. It may be, in a matter of this kind, where the finding of fact is merely a premise to laying down a rule of law, that this Court has power to form its own judgment without the aid of a jury. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227. But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this Court has gone a certain distance in that direction. *Dobbins v. Los Angeles*, 195 U. S. 222; *Lochner v. New York*, 198 U. S. 45, 58 *et seq.* \* \* \* But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson v. Massachusetts*, 197 U. S. 11; *s. c.*, 183 Massachusetts, 242. See *Otis v. Parker*, 187 U. S. 606, 608, 609. Again there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. \* \* \* The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold.

Judgment affirmed.

#### NOTE

1. Compare *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. 143, Ann. Cas. 1917B, 927 (1915), in which was sustained an ordinance of

the city of Los Angeles prohibiting the manufacture of brick within a defined area of the city, as against an owner of land who alleged that his eight acres of brick clay therein were worth \$800,000 for the manufacture of bricks but not more than \$60,000 for residential or any other purposes; that the city embraced 107.62 square miles in area, 75% of it devoted to residences, and that the area defined in the ordinance was only sparsely settled.

### PENNSYLVANIA COAL CO. v. MAHON.

Supreme Court of the United States, 1922.

260 U. S. 393, 67 L. ed. 322, 43 Sup. Ct. 158, 28 A. L. R. 1321.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P. L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due

process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95, 103. The extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. *Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought. Decree reversed.

MR. JUSTICE BRANDEIS, dissenting. \* \* \*

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious—as it may because of further change in local or social conditions—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. *Welch v. Swasey*, 214 U. S. 91. Compare *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *Walls v. Midland Carbon Co.*, 254 U. S. 300. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargarine cases settled that. *Mugler v. Kansas*, 123 U. S. 623, 668, 669; *Powell v. Pennsylvania*, 127 U. S. 678, 682. See also *Hadacheck v. Los Angeles*, 239 U. S. 394; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each

owner to build above the limiting height; but it is settled that the state need not resort to that power. Compare *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358; *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121. \* \* \*

The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced. \* \* \*

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, *Wurts v. Hoagland*, 114 U. S. 606; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; or upon adjoining owners, as by party wall provisions, *Jackman v. Rosenbaum Co.*, 260 U. S. 22. But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

#### NOTES

1. Due process of law in eminent domain requires that at some stage of the proceeding before the judgment and award become final, the owner of property to be taken must have an opportunity to be heard on the issue of whether the amount of compensation is just. *Bragg v. Weaver*, 251 U. S. 57, 64 L. ed. 135, 40 Sup. Ct. 62 (1919). However, in condemnation proceedings as in lawsuits generally, due process does not require that a trial shall be free from error. In *Roberts v. New York*, 295 U. S. 264, 277, 79 L. ed. 1429, 55 Sup. Ct. 689 (1935), Mr. Justice Cardozo, for the court, said: "Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. \* \* \* To bring about a taking without due process of

law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

2. A statute authorizing riparian owners of lands on non-navigable streams to erect mill-dams for manufacturing purposes upon payment of damages to the owners of lands flooded thereby, does not deprive such latter owners of their property without due process of law and is within the constitutional power of a legislature as a valid exercise of the police power. *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. 441 (1885).

3. The owner of standing timber within 400 feet of a watershed owned by a city or town for a water supply may be required, upon cutting the timber, to remove waste in order to prevent the spread of fire and resulting damage to the watershed. *Perley v. North Carolina*, 249 U. S. 510, 63 L. ed. 735, 39 Sup. Ct. 357 (1919).

4. Where the noise and glaring lights at night of government planes landing at or leaving an airport leased to the United States, flying at low altitudes but using the path or glide approved by the Civil Aeronautics Authority, interfere with the normal use as a commercial chicken farm of property situated near the airport, there is such a taking as to give the owner a right to compensation under the Fifth Amendment. Justices Black and Burton dissented. *United States v. Causby*, 328 U. S. 256, 90 L. ed. 1206, 66 Sup. Ct. 1062 (1946). See the annotation following the case in 90 L. ed. 1218 (1946).

5. Pursuant to an executive order of the President, the United States seized and operated for five months a coal mine to avert a national strike of miners. The owner's claim to recover under the Fifth Amendment for the total operating losses sustained during the period of government operation was allowed by the Court of Claims to the extent to which the losses were attributable to increased wage payments made by the government to comply with a decision of the War Labor Board. In affirming this judgment, all members of the Supreme Court agreed that the seizure constituted a taking of property which justified compensation. Five justices (Black, Frankfurter, Douglas, Jackson and Reed) held that the loss attributable to the increased wage payments was compensable. The four justices first named took the view that the government was liable for losses, irrespective of whether or not they would have been sustained by the owner even in the absence of government seizure, while Justice Reed, holding that liability should extend only to losses incurred by governmental acts, concurred on the ground that the loss in question was suffered as a result of such an act. The dissenting justices (Chief Justice Vinson and Justices Burton, Clark and Minton) thought that the owner had not, in fact, been financially harmed by the government's acts. *United States v. Pewee Coal Co.*, 341 U. S. 114, 95 L. ed. 809, 71 Sup. Ct. 670 (1951).

6. In *United States v. Caltex (Philippines)*, 344 U. S. 149, 97 L. ed. 157, 73 Sup. Ct. 200 (1952) the court held that no compensable taking by the United States was effected by the destruction, by its retreating army, of waterfront terminal facilities of oil companies in Manila to prevent them from falling into enemy hands. Justices Black and Douglas dissented.

### NOBLE STATE BANK v. HASKELL.

Supreme Court of the United States, 1911.

219 U. S. 104, 55 L. ed. 112, 31 Sup. Ct. 186, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a proceeding against the Governor of the State of Oklahoma and other officials who constitute the state banking board, to prevent

them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the board and directs it to levy upon every bank existing under the laws of the state an assessment of one per cent. of the bank's average daily deposits, with certain deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be 5 per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the guaranty fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with article 1, § 10, and the Fourteenth Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the Supreme Court of the state. 22 Otd. 48.

The reference to article 1, § 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See *Sherman v. Smith*, 1 Black. 587. Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to

pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield v. New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372; *Bacon v. Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386. The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188. So far is that from being the case that the device is a familiar one. It was adopted by some states the better

part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92; *People v. Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 496; *Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 217 U. S. 461.

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355. It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association v. Topeka*, 20 Wall. 655; *Lowell v. Boston*, 111 Mass. 454.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described cooperation are necessary safeguards, this Court certainly cannot say that it is wrong. \* \* \* Judgment affirmed.

#### NOTES

1. The statute in the reported case, enacted in the wake of the panic of 1907, is an example of legislative experimentation to meet a demonstrated need. Similar laws passed in Nebraska and Kansas were upheld in *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. 189 (1911), and *Assaria State Bank v. Dolley*, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. 189 (1911). Experience proved the laws to be unworkable. But since no constitutional obstacle stood in the way of further experimentation, it was possible to profit by past errors and seek a more mature solution of the problem in the field of federal legislation. The result was the creation of the Federal Deposit Insurance Corporation by the Banking Act of 1933 (12 U. S. C. § 264; F. C. A. 12 § 264), which has proved successful in its operation.

2. *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690, 51 Sup. Ct. 252 (1931) sustained a Nebraska statute authorizing the levy of certain special assessments against state banks under the bank guaranty law of that state against an attack grounded on the view that their collection constituted a taking of the plaintiff bank's property without due process of law.

3. *California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U. S. 105, 95 L. ed. 788, 71 Sup. Ct. 601 (1951) upheld as consistent with due process the California Compulsory Assigned Risk Law, which made it mandatory on all automobile liability insurers to subscribe to a plan for the equitable apportionment among such insurers of applicants who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The court said that the case in its broadest reach was one in which the state requires in the public interest each member of a business to assume a *pro rata* share of a burden which modern conditions have made incident to the business. It was therefore similar to the situation in *Noble State Bank v. Haskell*.

4. The Supreme Court has sustained the constitutionality of so-called "blue-sky laws," enacted in virtually all states to prevent the issuance, flotation, and sale of fraudulent issues of stocks and worthless securities. Laws of this type are prime examples of the police power objective of the prevention of fraud and deceit. *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. 217, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643 (1917). The regulatory power of Congress in this field, as evidenced by the enactment of the Federal Securities Act of 1933 and of the Securities Exchange Act of 1934, should also be noted.

### EUCLID v. AMBLER REALTY CO.

Supreme Court of the United States, 1926.

272 U. S. 365, 71 L. ed. 303, 47 Sup. Ct. 114, 54 A. L. R. 1016.

[Bill by the Ambler Realty Co. to enjoin enforcement by the Village of Euclid of a comprehensive zoning ordinance. From a decree for plaintiff in the District Court of the United States for the Northern District of Ohio defendants appeal.]

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the city of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately  $3\frac{1}{2}$  miles each way. East and west it is traversed by three principal highways: Euclid avenue, through the southerly border, St. Clair avenue, through the central portion, and Lake Shore boulevard, through the northerly border, in close proximity to the shore of Lake Erie. The Nickel Plate Railroad lies from 1,500 to 1,800 feet north of Euclid avenue, and the Lake Shore Railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid avenue to

the south and the Nickel Plate Railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc. \* \* \*

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect to use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot. \* \* \*

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. \* \* \*

The motion [to dismiss the bill] was properly overruled, the effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses, and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. \* \* \* Is the ordinance invalid, in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory"?

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained,

under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim "*sic utere tuo ut alienum non laedas*," which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. *Sturgis v. Bridgeman*, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York*, 264 U. S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch v. Swasey*, 214 U. S. 91; *Hada-check v. Los Angeles*, 239 U. S. 394; *Reinman v. Little Rock*, 237 U. S. 171; *Cusack Co. v. City of Chicago*, 242 U. S. 526, 529, 530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498, 500. The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed. \* \* \*

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all. \* \* \*

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires,

and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on. \* \* \*

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Cusack Co. v. City of Chi-*

cago, *supra*, pages 530-531; *Jacobson v. Massachusetts*, 197 U. S. 11, 30-31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the land-owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. \* \* \* Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER dissent.

#### NOTE

1. The principal case is annotated in 54 A. L. R. 1030 (1928). In *Zahn v. Board of Public Works*, 274 U. S. 325, 71 L. ed. 1074, 47 Sup. Ct. 594 (1927) a Los Angeles ordinance was sustained which established an exclusively resi-

dential zone of an area, including the complainant's land, though the latter would have had a greatly enhanced value if available for business purposes. A large part of this area though still vacant had already been restricted to residence use by private covenants before the ordinance was passed. "The ordinance," the court said, "is of the now familiar comprehensive type, but in the main regulates only the character of buildings which lawfully may be erected and does not prescribe height and area limitations." Regulations as to height and area have generally been sustained, however. See *Gorieb v. Fox*, 274 U. S. 603, 71 L. ed. 1228, 47 Sup. Ct. 675, 53 A. L. R. 1210 (1927), sustaining an ordinance which created a set-back or building line, with relation to the street, to which all buildings subsequently erected had to conform, the line to be at least as far from the street as that occupied by sixty per cent of the existing houses in the block.

Specific provisions of zoning ordinances were held invalid in *Nectow v. Cambridge*, 277 U. S. 183, 72 L. ed. 842, 48 Sup. Ct. 447 (1928), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. ed. 210, 49 Sup. Ct. 50, 86 A. L. R. 654 (1928). It has been generally stated that every intendment will be indulged in favor of the validity of a zoning ordinance and a presumption has been applied that the determination of a local zoning board is correct. Regulations, however, must have a reasonable relation to the public welfare and there must be no unreasonable, oppressive, or unwarranted interference with property rights. To prevent litigation, zoning laws generally vest in administrative agencies power to make exceptions in certain cases where strict application of the law would result in undue hardship.

Regulation of billboards and other forms of outdoor advertising has been considered in many cases. A leading case in the field is *Cusack Co. v. Chicago*, 242 U. S. 526, 61 L. ed. 472, 37 Sup. Ct. 190, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594 (1917), where an ordinance was upheld which required the consent of the adjacent owners to the erection of billboards in districts which were primarily residential, the court emphasizing the fire, health, safety and morals factors which supplied a basis for the regulation. The court held that billboards might be entirely prohibited in residential blocks and therefore the consent provision was a possible benefit to those wishing to erect billboards in such a block.

For discussions of zoning and related problems, see *Noel, Unaesthetic Sights as Nuisances*, 25 *Corn. L. Q.* 1 (1939), *Retroactive Zoning and Nuisances*, 41 *Col. L. Rev.* 457 (1941); *Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 *So. Cal. L. Rev.* 149 (1954). For an interesting behind-the-scenes account of how Mr. Justice Sutherland, who originally voted to hold the zoning ordinance in *Euclid v. Ambler* unconstitutional, was finally won over to the view which eventually prevailed, see *McCormack, A Law Clerk's Recollections*, 46 *Col. L. Rev.* 710, 712 (1946).

### ALLGEYER v. LOUISIANA.

Supreme Court of the United States, 1897.  
165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427.

[The State of Louisiana brought an action in a Louisiana court to recover from Allgeyer & Co., three statutory penalties of \$1000 each for alleged violations of a Louisiana statute which purported so to penalize any person, firm or corporation, who "in any manner whatsoever does any act in this state to effect, for himself or for another, insurance on property then in this state in any marine insurance company which has

not complied in all respects with the laws of this state." The agreed facts showed that Allgeyer & Co., cotton exporters doing business in New Orleans, made a contract of open marine insurance with the Atlantic Mutual Insurance Company, a New York company, which had no agent in Louisiana and which had not complied with the requirements of Louisiana for the doing of business in that state. In accordance with the terms of this open policy Allgeyer & Co. upon later making a shipment of cotton gave notice to the insurance company by letter mailed in Louisiana, the notice being necessary to cause the open policy to attach to any particular shipment. By the terms of the policy, premiums and losses were payable in New York. Premiums were remitted by the defendants from New Orleans. The Supreme Court of Louisiana, reversing the trial court, gave judgment for one penalty of \$1000 and this writ of error was taken.]

MR. JUSTICE PECKHAM delivered the opinion of the Court.

There is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute. The cases upon this subject are cited in the opinion of the court in *Hooper v. California*, 155 U. S. 648.

A conditional prohibition in regard to foreign insurance companies doing business within the State of Louisiana is to be found in article 236 of the constitution of that state, which reads as follows: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the state, upon whom process may be served."

It is not claimed in this suit that the Atlantic Mutual Insurance Company has violated this provision of the Constitution by doing business within the state. \* \* \*

In the course of the opinion delivered in this case by the Supreme Court of Louisiana that court said:

"The open policy in this case is conceded to be a New York contract; hence the special insurance effected on the cotton complained of here was a New York contract. \* \* \* We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. We are concerned only with the fact of its having been entered into by a citizen of Louisiana while within her limits affecting property within her territorial limits. It is the act of the party, and not the contract, which we are to consider. \* \* \* The defendants while in the state undoubtedly insured their property located in the state in a foreign insurance company under an open policy. The instant the letter or communication was mailed or telegraphed the property was insured. The act of insurance was done within the state and the offence denounced by the statute was complete." \* \* \*

We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

It is natural that the state court should have remarked that there is in this "statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired." Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state for doing business within its limits. In this case the company did no business within the state, and the contracts were not therein made.

The Supreme Court of Louisiana says that the act of writing within that state the letter of notification was an act therein done to effect an insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the Fourteenth Amendment of the federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in *Butchers' Union Company v. Crescent City Company*, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of

Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again, on page 764 the learned justice said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And again, on page 765: "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty," as contained in the Fourteenth Amendment. \* \* \*

The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word "liberty" as used in the Amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.

Has not a citizen of a state, under the provisions of the federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper Case (*supra*), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem

proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal Constitution.

In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. \* \* \*

Judgment reversed.

## NOTES

1. *Allgeyer v. Louisiana* is the first case in which the Supreme Court relied upon the "liberty of contract" concept as a ground for invalidating a statute. Note that the expressions of Mr. Justice Bradley in the cited case, which are quoted with approval by Mr. Justice Peckham, are repetitions of statements made by Bradley in his dissenting opinion in the celebrated *Slaughter-House Cases*, considered in Chapter IV. Thus the "fundamental rights" doctrine rejected in the *Slaughter-House Cases*, where the privileges and immunities clause of the Fourteenth Amendment was the principal bone of contention, found its way into Supreme Court decisions through its adoption in the *Allgeyer* case as a definition of due process of law. The influence and significance of the "liberty of contract" concept will be seen shortly in connection with cases involving the constitutionality of price-fixing laws and of legislative regulation of the employer-employee relationship. Mr. Justice Field had evidently foreseen the possibilities of the due process clause in this respect much earlier, since he in effect relied upon it in his dissent in *Munn v. Illinois*, 94 U. S. 113, 136, 24 L. ed. 77 (1876). See, generally, Pound, *Liberty of Contract*, 18 *Yale L. J.* 454 (1909), 2 *Selected Essays on Constitutional Law* (1938), 208; Reeder, *The Due Process Clauses and "The Substance of Individual Rights,"* 58 *U. of Pa. L. Rev.* 191 (1910); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 *Harv. L. Rev.* 431 (1926), 2 *Selected Essays on Constitutional Law* (1938), 237.

2. Compare *Osborn v. Ozlin*, 310 U. S. 53, 84 L. ed. 1074, 60 *Sup. Ct.* 758 (1940), sustaining a Virginia statute which forbade contracts of insurance or surety by companies authorized to do business within the state except through regularly constituted and registered resident agents of such companies. Pointing out that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, the court said: "If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards."

## MEYER v. NEBRASKA.

Supreme Court of the United States, 1923.

262 U. S. 390, 67 L. ed. 1042, 43 Sup. Ct. 625, 29 A. L. R. 1446.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska. \* \* \* The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919. \* \* \*

The Supreme Court of the state affirmed the judgment of conviction. 107 Neb. 657. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by the Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefor. \* \* \* The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. \* \* \* While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Citations are omitted.] The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton v. Steele*, 152 U. S. 133, 137.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential,

indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that "the so-called ancient or dead languages" are not "within the spirit or the purpose of the act." *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 187 N. W. 927. Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means. \* \* \* The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v. Tanner*, 244 U. S. 590, 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed.

[MR. JUSTICE HOLMES and MR. JUSTICE SUTHERLAND dissented.]

#### NOTES

1. Statutes similar to the one declared invalid in the principal case were stricken down in the companion case of *Bartels v. Iowa*, 262 U. S. 404, 67 L. ed. 1047, 43 Sup. Ct. 628 (1923), decided on the same day. In this case Mr. Justice Holmes (with the concurrence of Mr. Justice Sutherland) dissented, saying in part: "It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is 'whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.'"

2. In *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 358, 3 Ann. Cas. 765 (1905), a case involving a state compulsory vaccination law, the court had before it a legislative restriction involving "liberty" in its original sense of restraint of the person. It was contended that the law was "hostile

to the inherent right of every free man to care for his own body and health in such way as to him seems best." The court, however, in sustaining the statute, said that the "liberty" secured by the Constitution "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Moreover, in view of the methods commonly employed to stamp out smallpox, it could not be asserted "that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety."

3. In *Buck v. Bell*, 274 U. S. 200, 71 L. ed. 1000, 47 Sup. Ct. 584 (1927), in sustaining a Virginia statute of 1924 providing for the sterilization of mental defectives who were inmates of state institutions, Mr. Justice Holmes, speaking for the court said: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. \* \* \* Three generations of imbeciles are enough."

4. In *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. ed. 1070, 45 Sup. Ct. 571, 39 A. L. R. 468 (1925), an Oregon statute, adopted in 1922 to become effective in 1926, was held invalid which imposed criminal penalties upon any parent or guardian of a child between the ages of eight and sixteen (with certain exceptions) who failed to send such child to a public school, for the full school period each year. The court, through Mr. Justice McReynolds, said: "Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. \* \* \* The fundamental theory of liberty upon which all governments of this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

5. The due process clause of the Fourteenth Amendment was held not to have been violated by a state law which authorized the suspension from practice, for six months, of a physician because he had been convicted in a federal court of failing to produce, before a congressional committee, papers belonging to an organization headed by him which had been subpoenaed by the committee. One of the points in issue was whether due process had been denied by the introduction of evidence in the administrative proceedings to suspend the physician's license that this organization was listed by the Attorney General as subversive. Separate dissenting opinions were written by Justices Black, Douglas and Frankfurter. *Barsky v. Board of Regents of University of New York*, 347 U. S. 442, 98 L. ed. 829, 74 Sup. Ct. 650 (1954).

## Section 2.—The Regulation and Price Control of Business Affected With a Public Interest.

### MUNN v. ILLINOIS.

Supreme Court of the United States, 1876.

94 U. S. 113, 24 L. ed. 77.

Error to the Supreme Court of the State of Illinois.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant— \* \* \*

3. To that part of Amendment XIV which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first. \* \* \*

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the Amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachment upon an acknowledged right of citizenship by the legislatures of the states. \* \* \*

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe v. R. & V. Railroad Co.*, 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *Sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, \* \* \* that is to say, \* \* \* the power to govern men and things." Under these

powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate \* \* \* the rates of wharfage at private wharves, \* \* \* the sweeping of chimneys, and to fix the rates of fees therefor, \* \* \* and the weight and quality of bread," 3. Stat. 587, sect. 7; and, in 1848, "to make all necessary regulation respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 Id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. \* \* \* [Here follow passages from Sir Matthew Hale's writings, as to ferries and wharves.]

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606. \* \* \*

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. [The Court here summarized the vast amount of business done by the grain elevators in Chicago and the manner of conducting their business.]

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass.

Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he \* \* \* take but reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

\* \* \*

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control

over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. \* \* \*

[The Court held that the statute was not in conflict with the commerce clause or with Art. I, § 9, prohibiting port preferences.]

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. \* \* \*

Judgment affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

MR. JUSTICE FIELD. \* \* \* The power of the state over the property of the citizens under the constitutional guaranty is well defined. The state may take his property for public uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non lædas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and over-

whelming necessity to prevent a public calamity, the power of the state over the property of the citizens does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the state, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the state, or the municipality exercising a delegated power from the state, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitroglycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance: whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, state or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant,

and the state, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases. \* \* \*

There is nothing in the character of the business of the defendants as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the state to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise. \* \* \*

#### NOTE

1. *Munn v. Illinois* is the most important of a group of cases, decided at the same time, usually referred to as the "Granger Cases." The other cases involved the validity of legislative regulation of rates charged by railroad corporations. The Granger movement—the name derived from the activities of the National Grange, an order that flourished during the eighteen-seventies—was an organized effort upon the part of western farmers to secure relief through regulatory legislation from excessive transportation rates and other objectionable practices of railroads. This legislation was upheld against attacks based upon the due process, contract and commerce clauses.

The view expressed in the Granger cases that a provision in the charter of a railroad corporation authorizing it to fix its rates does not prevent the state granting the charter from thereafter prescribing maximum rates, since the charter authority was impliedly limited to the fixing of "reasonable" rates, was reaffirmed in the *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334 (1886). Here, however, Chief Justice Waite, again speaking for the court, issued a warning that was to prove prophetic: "From what has been said, it is not to be inferred that this power of regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Four years later, in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462 (1890), the court, following up the dictum in the *Railroad Commission Cases*, held unconstitutional a Minnesota statute which required all railroads to charge only equal and reasonable rates and authorized a state commission, if it found any rates not to meet this standard, to prescribe proper rates which should then be binding upon the railroad, without appeal to the courts. Said Mr. Justice Blatchford: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." The

doctrine of this case was reaffirmed and extended in *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047 (1894).

Another advance in the process of securing to the judiciary the final determination of reasonableness in governmental rate-fixing was made in the leading case of *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418 (1898), where, in holding invalid a railroad rate fixed by statute, the view was projected that no legislative body or commission can validly fix rates that are so low as not to allow the railroad or other public utility a fair return on the present value of the property used and useful in serving the public. The court said, through Mr. Justice Harlan: "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

The proposition that a public utility is entitled to a "fair" return on the present "value" of its property and that a rate below this point is "confiscatory" and hence a violation of due process requires the courts to undertake the solution of many complex and difficult problems involved in the determination of what is a fair return, the rate, the rate base, and the elements to be considered as constituting the base. These matters are dealt with in courses in the law of public utilities and are omitted from consideration in this case-book.

### WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF KANSAS.

Supreme Court of the United States, 1923.

262 U. S. 522, 67 L. ed. 1103, 43 Sup. Ct. 630, 27 A. L. R. 1280.

This case involves the validity of the Court of Industrial Relations Act of Kansas. Chapter 29, Special Session, Laws of 1920. The act declares the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; second, manufacture of clothing for human wear; third, production of any substance in common use for fuel; fourth, transportation of the foregoing; fifth, public utilities and common carriers. The act vests an industrial court of three judges with power upon its own initiative or on complaint to summon the parties and hear any dispute over wages or other terms of employment in any such industry, and if it shall find the peace and health of the public imperiled by such controversy, it is required to make findings and fix the wages and other terms for the future conduct of the industry. After 60 days, either party may ask for a readjustment, and then the order is to continue in effect for such reasonable time as the court shall fix, or until changed by agreement of the parties. The

Supreme Court of the state may review such orders, and in case of disobedience to an order that court may be appealed to for enforcement.

The Charles Wolff Packing Company, the plaintiff in error, is a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It has \$600,000 capital stock and total annual sales of \$7,000,000. More than half its products are sold beyond the state. It has 300 employees. There are many other packing houses in Kansas, of greater capacity. This is considered a small one.

In January, 1921, the president and secretary of the Meat Cutters' Union filed a complaint with the industrial court against the packing company respecting the wages its employees were receiving. The company appeared and answered and a hearing was had. The court made findings, including one of an emergency, and an order as to wages, increasing them over the figures to which the company had recently reduced them. The company refused to comply with the order and the industrial court then instituted mandamus proceedings in the Supreme Court to compel compliance. That court appointed a commissioner to consider the record, to take additional evidence, and report his conclusions. He found that the company had lost \$100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court. The Supreme Court overruled his report and held that the evidence showed a sufficient emergency.

The prescribed schedule of wages and the limitation of hours and the rate of pay required for overtime resulted in an increase in wages of more than \$400 a week. \* \* \*

The chief executive of the Wolff Company testified that there had been no difficulty in securing all the labor it desired at the reduced rates offered. The industrial court conceded that the Wolff Company could not operate on the schedule fixed without a loss, but relied on the statement by its president that he hoped for more prosperous times.

The packing company brings this case here on the ground that the validity of the Industrial Court Act was upheld although challenged as in conflict with the provision of the Fourteenth Amendment that no state shall deprive any person of liberty or property without due process of law.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The necessary postulate of the Industrial Court Act is that the State, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree. Under the construction adopted by the state Supreme Court the act gives the industrial court authority to permit the owner or employer to go out of the business, if he shows that

he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. *Block v. Hirsh*, 256 U. S. 135, 157. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U. S. 390. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Children's Hospital*, 261 U. S. 525.

It is argued for the state that such exceptional circumstances exist in the present case and that the act is neither arbitrary nor unreasonable. Counsel maintain:

First. The act declares that the preparation of human food is affected by a public interest and the power of the Legislature so to declare and then to regulate the business is established in *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoeser*, 153 U. S. 391; *Noble State Bank v. Haskell*, 219 U. S. 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389; and *Block v. Hirsh*, 256 U. S. 135.

Second. The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation. *Wilson v. New*, 243 U. S. 332, 352, 353.

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. *State v. Edwards*, 86 Me. 102; *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 254.

(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the

public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 94 U. S. 113; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Budd v. New York*, 117 N. Y. 1, 27; S. C. 143 U. S. 517; *Brass v. Stoeser*, 153 U. S. 391; *Noble State Bank v. Haskell*, 219 U. S. 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389; *Van Dyke v. Geary*, 244 U. S. 39, 47; *Block v. Hirsh*, 256 U. S. 135.

It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. \* \* \*

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances. \* \* \*

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the

health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever.

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi public businesses, noted above, because, even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109

U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. By section 6 reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the industrial court power in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and after hearing and investigation to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.

There is no authority of this Court to sustain such exercise of power in respect to those kinds of businesses affected with a public interest by a change in pais, first fully recognized by this Court in *Munn v. Illinois*, supra, where it said:

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 345. If that be so with the owner and employer, a fortiori must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.

We are considering the validity of the act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine

against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer the effect upon the employee should not be a factor in our judgment.

Justification for such regulation is said to be found in *Wilson v. New*, 243 U. S. 332. It was there held that in a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis, and grave loss and suffering overhanging the country, Congress had power to prescribe wages not confiscatory, but obligatory on both for a reasonable time to enable them to agree. \* \* \*

But the chief and conclusive distinction between *Wilson v. New* and the case before us is that already referred to. The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, *Brooks-Scanlon Co. v. R. R. Commission*, 251 U. S. 396; *Bullock v. Railroad Commission*, 254 U. S. 513, it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable. \* \* \*

We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law.

The judgment of the court below must be

Reversed.

#### NOTES

1. In *Dorchy v. Kansas*, 264 U. S. 286, 68 L. ed. 686, 44 Sup. Ct. 323 (1924) the Kansas Court of Industrial Relations Act, held unconstitutional in the principal case as applied to packing companies, was declared invalid as applied to coal mines. And in *Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 267 U. S. 552, 69 L. ed. 785, 45 Sup. Ct. 441 (1925) the same act was again declared unconstitutional as applied to the meat packing industry, in so far as it permitted the fixing of hours of labor as a feature of the system of compulsory arbitration which had been invalidated in the principal case.

2. In *Block v. Hirsh*, 256 U. S. 135, 65 L. ed. 865, 41 Sup. Ct. 458, 16 A. L. R. 165 (1921) an Act of Congress was sustained which provided that residential tenants in the District of Columbia might remain in possession of leased premises after the expiration of their leases, paying the same rent as fixed in the expired contracts. The act was emergency legislation and was to expire in two years. It was passed to alleviate the bad housing situation in Washington during World War I due to the sudden increase in population in

the national capital. The court found that the legislation bore a reasonable relation to the public health and welfare, all the elements of a public interest justifying some degree of public control being present. Chief Justice White and Justices Van Devanter, McKenna and McReynolds dissented. At the same time a similar statute of New York was upheld, the court overruling the same objections that were raised against the District of Columbia statute as well as an additional argument that the law impaired the obligations of contract. *Brown Holding Co. v. Feldman*, 256 U. S. 170, 65 L. ed. 877, 41 Sup. Ct. 465 (1921).

3. A statute of Kansas required fire insurance companies to file schedules of rates with the state superintendent of insurance and authorized him to require rates to be lowered or raised, as he should determine, the rate in every case to be reasonable. In a suit brought by an insurance company to restrain the enforcement of the law, the complaint being grounded on the contention that fire insurance was a private business and hence there was no constitutional power in a state to fix rates and charges for services rendered, the court held that the business was so far affected with a public interest as to justify the legislative regulation involved. *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. 612, L. R. A. 1915C, 1189 (1914). In *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U. S. 251, 75 L. ed. 324, 51 Sup. Ct. 130, 72 A. L. R. 1163 (1931) a New Jersey statute was held valid which required the commissions of fire insurance agents to be reasonable and forbade payment by a fire insurance company of a higher commission to any agent than it paid to any other agent, the court saying: "It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy." Justices McReynolds, Sutherland and Butler dissented on the ground that the law impaired the "liberty of contract" guaranteed by the Fourteenth Amendment.

4. In *Tyson & Bro.—United Theater Ticket Offices v. Banton*, 273 U. S. 418, 71 L. ed. 718, 47 Sup. Ct. 426, 58 A. L. R. 1236 (1927) the court held that the due process clause prevented a state from fixing maximum fees for theater ticket agencies. The ground for decision was that the power to fix prices exists only where the business or property involved has become affected with a public interest and that theaters are not of that character. Justices Holmes, Brandeis, Sanford and Stone dissented.

5. In *Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1, 71 L. ed. 893, 47 Sup. Ct. 506, 52 A. L. R. 163 (1927) a state statute was held invalid which prohibited any buyer of milk or cream for re-sale or manufacture to discriminate between different sections of the state by buying at a higher price in one locality than in another, allowance being permitted only for difference in cost of transportation to place of manufacture or re-sale. The statute did not make intent to create a monopoly or to destroy the business of a competitor an essential element of the offense defined by it. The argued purpose of the act was to prevent buying at low prices in localities where a buyer had little or no competition, and at high prices in localities where he had competition. The court said that "the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition" and that the statute was "an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public."

6. *Ribnik v. McBride*, 277 U. S. 350, 72 L. ed. 913, 48 Sup. Ct. 545, 56 A. L. R. 1327 (1928) held invalid a New Jersey statute that required private employment agencies to charge no higher fees than those deemed reasonable by the state commissioner of labor, who was also authorized to refuse to issue or to revoke any license to the operator of such an agency for good cause shown. Justices Holmes, Brandeis and Stone dissented.

7. *Williams v. Standard Oil Co.*, 278 U. S. 235, 73 L. ed. 287, 49 Sup. Ct. 115, 60 A. L. R. 596 (1929) held invalid a Tennessee statute which required applicants for licenses to sell gasoline to file schedules of prices with the state superintendent of motors and motor fuels and empowered the latter to fix other prices if those submitted were not deemed reasonable by him, subject to appeal to the state commissioner of finance, and from the latter to the courts (the methods common in rate-making for public utilities). The court stated that the decision was controlled by *Wolff Packing Co. v. Court of Industrial Relations*, *Tyson v. Banton*, *Fairmont Creamery Co. v. Minnesota*, and *Ribnik v. McBride*. Justice Holmes dissented.

8. In *New State Ice Co. v. Liebmann*, 285 U. S. 262, 76 L. ed. 747, 52 Sup. Ct. 371 (1932), Oklahoma was prevented from controlling the business of manufacturing and selling ice by requiring a license to enter such business to be issued by the Corporation Commission of the state, which was to be granted only on proof of its necessity in the community or place desired. The court said that there was nothing about the ice business which distinguished it from ordinary manufacture and production. Since it was a business essentially private in nature, any regulation which had the effect of denying or unreasonably curtailing the common right to engage in it violated the Fourteenth Amendment. Mr. Justice Brandeis' dissenting opinion, in which Mr. Justice Stone joined, repudiated the "affectation with a public interest" test and expressed the view that "the true principle is that the state's power extends to every regulation of any business reasonably required and appropriate for the public protection." The dissent further warned that it was a grave responsibility for the court to assume when it stayed experimentation by the states in economic and social matters during a period of depression.

9. *Stephenson v. Binford*, 287 U. S. 251, 77 L. ed. 288, 53 Sup. Ct. 181, 87 A. L. R. 721 (1932) sustained a Texas statute regulating the use of the highways of the state by contract carriers of freight (as distinguished from common carriers) and giving to a state commission power to fix minimum rates to be charged by such carriers not less than the rates prescribed for common carriers for substantially the same service. The court said: "This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed, but is left free to charge as much more as he sees fit and can obtain. Undoubtedly, this interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute but subject to a great variety of legitimate restraints, among which are such as are required for the safety and welfare of the state and its inhabitants." Mr. Justice Butler dissented.

### NEBBIA v. NEW YORK.

Supreme Court of the United States, 1934.

291 U. S. 502, 78 L. ed. 940, 54 Sup. Ct. 505, 89 A. L. R. 1469.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Legislature of New York established, by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things, to "fix minimum and maximum \* \* \* retail prices to be charged by \* \* \* stores to consumers for consumption off the premises

where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. At his trial he asserted the statute and order contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

On March 10, 1932, the senate and assembly resolved "That a joint Legislative committee is hereby created \* \* \* to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the state; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price, both to producer and consumer." The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2,350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study of this material, a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This document included detailed findings, with copious references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions. \* \* \*

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers propor-

tioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. \* \* \*

Section 312(e), on which the prosecution in the present case is founded, provides: "After the board shall have fixed prices to be charged or paid for milk in any form \* \* \* it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price \* \* \*, and no method or device shall be lawful whereby milk is bought or sold \* \* \* at a price less or more than such price \* \* \* whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise \* \* \*"

Second. The more serious question is whether, in the light of the conditions disclosed, the enforcement of § 312(e) denied the appellant the due process secured to him by the Fourteenth Amendment. \* \* \*

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form "a portion of that immense mass of legislation, which embraces everything within the territory of a State \* \* \* all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, \* \* \* are component parts of this mass." \* \* \*

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results

that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

The reports of our decisions abound with cases in which the citizen, individual or corporate, has vainly invoked the Fourteenth Amendment in resistance to necessary and appropriate exertion of the police power.

\* \* \*

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. In this class fall laws forbidding unfair competition by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination. The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.

The milk industry in New York has been the subject of longstanding and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk.

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing

economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. The argument runs that the public control of rates or prices is per se unreasonable and unconstitutional, save as applied to businesses affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or one whose owner relies on a public grant or franchise for the right to conduct the business, or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or a business in its nature a monopoly. The milk industry, it is said, possesses none of these characteristics, and, therefore, not being affected with a public interest, its charges may not be controlled by the state. Upon the soundness of this contention the appellant's case against the statute depends.

We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago. *Munn v. Illinois*, 94 U. S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a misconception. *Munn* and *Scott* held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves. Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a "virtual

monopoly." This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. This Court concluded the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. It is true that the Court cited a statement from Lord Hale's *De Portibus Maris*, to the effect that when private property is "affected with a public interest, it ceases to be *juris privati* only"; but the court proceeded at once to define what it understood by the expression, saying: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large" (p. 126). Thus understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression. The Court had been at pains to define that power (pp. 124, 125) ending its discussion in these words:

"From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: It simply prevents the states from doing that which will operate as such a deprivation."

In the further discussion of the principle it is said that when one devotes his property to a use, "in which the public has an interest," he in effect "grants to the public an interest in that use" and must submit to be controlled for the common good. The conclusion is that if *Munn* and *Scott* wished to avoid having their business regulated they should not have embarked their property in an industry which is subject to regulation in the public interest.

The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously *Munn* and *Scott* had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.

In the same volume the court sustained regulation of railroad rates. After referring to the fact that railroads are carriers for hire, are incorporated as such, and given extraordinary powers in order that they may better serve the public, it was said that they are engaged in employment "affecting the public interest," and therefore, under the doctrine of the *Munn* case, subject to legislative control as to rates. And in an-

other of the group of railroad cases then heard it was said that the property of railroads is "clothed with a public interest" which permits legislative limitation of the charges for its use. Plainly the activities of railroads, their charges and practices, so nearly touch the vital economic interests of society that the police power may be invoked to regulate their charges, and no additional formula of affection or clothing with a public interest is needed to justify the regulation. And this is evidently true of all business units supplying transportation, light, heat, power and water to communities, irrespective of how they obtain their powers. \* \* \*

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522, 535. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this Court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co. v. United States*, 193 U. S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.

With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this Court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the Court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is

Affirmed.

[MR. JUSTICE McREYNOLDS delivered a dissenting opinion with which JUSTICES VAN DEVANTER, SUTHERLAND and BUTLER concurred.]

#### NOTE

1. The labor provisions of the Bituminous Coal Conservation Act of 1935 having been held unconstitutional in *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, 56 Sup. Ct. 855 (1936), Congress re-enacted the price-fixing provisions of the earlier law in the Bituminous Coal Act of 1937. These were held valid in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. ed. 1263,

60 Sup. Ct. 907 (1940), where Mr. Justice Douglas, for the court, said that price control is one of the means available to the states "for the protection and promotion of the welfare of the economy." Answering the contention that the legislation was not an appropriate exercise of congressional power, he continued: "It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would. To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade."

OLSEN v. NEBRASKA EX REL. WESTERN REFERENCE  
& BOND ASSN.

Supreme Court of the United States, 1941.

313 U. S. 236, 85 L. ed. 1305, 61 Sup. Ct. 862, 133 A. L. R. 1500.

[The challenged statute of Nebraska limited the charges of private employment agencies to a \$2 registration fee and 10% of the first month's pay of an applicant for employment.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In reliance upon *Ribnik v. McBride*, 277 U. S. 350, the Supreme Court of Nebraska held, one judge dissenting, that a statute of that state fixing the maximum compensation which a private employment agency might collect from an applicant for employment was unconstitutional under the due process clause of the Fourteenth Amendment. *State ex rel. Western Reference & Bond Assn. v. Kinney*, 138 Neb. 574, 293 N. W. 393. The case is here on a petition for certiorari which we granted because of the importance of the constitutional question which was raised.

The action is for a peremptory writ of mandamus ordering petitioner, Secretary of Labor of Nebraska, to issue a license to the relator to operate a private employment agency for the year commencing May 1, 1940. The license was withheld because of relator's refusal to limit its maximum compensation, as provided by the statute, to ten per cent of the first month's salary or wages of the person for whom employment was obtained. The petition in mandamus challenged the constitutionality of those provisions of the act. The answer sought to sustain them by alleging that the business of a private employment agency is "vitally affected with a public interest" and subject to such regulation under the police power of the state. The relator's motion for judgment on the pleadings was sustained and it was ordered that a peremptory writ of mandamus should issue.

We disagree with the Supreme Court of Nebraska. The statutory provisions in question do not violate the due process clause of the Fourteenth Amendment.

The drift away from *Ribnik v. McBride*, *supra*, has been so great that it can no longer be deemed a controlling authority. It was decided in 1928. In the following year this Court held that Tennessee had no power to fix prices at which gasoline might be sold in the state. *Williams v. Standard Oil Co.*, 278 U. S. 235. Save for that decision and *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U. S. 587, holding unconstitutional a New York statute authorizing the fixing of women's wages, the subsequent cases in this Court have given increasingly wider scope to the price-fixing powers of the states and of Congress. *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, decided in 1930, upheld the power of the Secretary of Agriculture under the Packers and Stockyards Act to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis. In 1931 a New Jersey statute limiting commissions of agents of fire insurance companies was sustained by *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U. S. 251. A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. *Nebbia v. New York*, 291 U. S. 502. And see *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163; *Borden's Farm Products Co., Inc. v. Ten Eyck*, 297 U. S. 251. *Cf. Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511; *Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266. In 1937 *Adkins v. Children's Hospital*, 261 U. S. 525, was overruled and a statute of Washington which authorized the fixing of minimum wages for women and minors was sustained. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. In the same year *Townsend v. Yeomans*, 301 U. S. 441, upheld a Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. *Cf. Mulford v. Smith*, 307 U. S. 38; *Currin v. Wallace*, 306 U. S. 1. The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld in *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, decided in 1939. The next year the price-fixing provisions of the Bituminous Coal Act of 1937, 15 U. S. C. §§ 828-851, were sustained. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381. And at this term we upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. § 201 *et seq.*; *United States v. F. W. Darby Lumber Co.*, 312 U. S. 100. These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik* case. The standard there employed, following that used in *Tyson & Bro. v. Banton*, 273 U. S. 418, 430 *et seq.*, was that the constitutional validity of price-fixing legislation, at least in absence

of a so-called emergency, was dependent on whether or not the business in question was "affected with a public interest." Cf. *Brazee v. Michigan*, 241 U. S. 340. It was said to be so affected if it had been "devoted to the public use" and if "an interest in effect" had been granted "to the public in that use." *Ribnik v. McBride*, supra. That test, labelled by Mr. Justice Holmes in his dissent in the *Tyson* case, as "little more than a fiction," was discarded in *Nebbia v. New York*, supra. It was there stated that such criteria "are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices," and that the phrase "affected with a public interest" can mean "no more than that an industry, for adequate reason, is subject to control for the public good." And see the dissenting opinion in *Ribnik v. McBride*. \* \* \*

The *Ribnik* case, freed from the test which it employed, can no longer survive. But respondents maintain that the statute here in question is invalid for other reasons. They insist that special circumstances must be shown to support the validity of such drastic legislation as price-fixing, that the executive, technical and professional workers which respondents serve have not been shown to be in need of special protection from exploitation, that legislative limitation of maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs, that the increasing competition of public employment agencies and of charitable, labor union and employer association employment agencies have curbed excessive fees by private agencies, and that there is nothing in this record to overcome the presumption as to the result of the operation of such competitive, economic forces. And in the latter connection respondents urge that since no circumstances are shown which curb competition between the private agencies and the other types of agencies, there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation.

\* \* \*

There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. \* \* \* Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.

The judgment is reversed and the cause is remanded to the Supreme Court of Nebraska for proceedings not inconsistent with this opinion.

It is so ordered.

## NOTES

1. The *Nebbia*, *Sunshine Anthracite Coal* and *Olsen* cases have established that, so far as the federal Constitution is concerned, the concept of "affectation with a public interest" as a criterion for determining the constitutionality of legislation regulating social and economic affairs has been abandoned. The due process clauses of the Fifth and Fourteenth Amendments are guaranties only against unreasonable and arbitrary legislative or other governmental action and do not embody any particular economic philosophy. The validity of price-fixing laws, or of other laws curtailing liberty of contract, thus depends, as do other exertions of regulatory power, upon whether they are reasonable means of protecting the public interest against recognized evils. Moreover, the Supreme Court has in large measure renounced its power to review legislative findings of fact as to the existence of evils or the effectiveness of remedies when passing upon the constitutionality of laws regulating business and industrial practices deemed to be inimical to the public welfare. See *Daniel v. Family Security Life Insurance Co.*, 336 U. S. 220, 93 L. ed. 632, 69 Sup. Ct. 550, 10 A. L. R. (2d) 945 (1949), where the court said: "We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature."

State courts of last resort, however, may interpret the provisions of due process clauses in state constitutions as they see fit, without review by the Supreme Court of the United States. As a consequence, in some states statutes have been held invalid by state Supreme Courts on the basis of legal doctrines or reasoning previously embraced but now abandoned by the Supreme Court of the United States. For example, in *Boomer v. Olsen*, 143 Nebr. 579, 10 N. W. (2d) 507 (1943), the Nebraska Supreme Court, after the decision in the principal case, held unconstitutional the same statute under the state constitution. This development is discussed in Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev. 91 (1950).

2. For informative discussions of the "affectation with a public interest" formula and its effect on the validity of price-fixing laws, see generally, McAllister, *Lord Hale and Business Affected With a Public Interest*, 43 Harv. L. Rev. 759 (1930), 2 *Selected Essays on Constitutional Law* (1938), 467; Hamilton, *Affectation With Public Interest*, 39 Yale L. J. 1089 (1930), 2 *Selected Essays on Constitutional Law* (1938), 494; Finkelstein, *From Munn v. Illinois to Tyson v. Banton: A Study in the Judicial Process*, 27 Col. L. Rev. 769 (1927), 2 *Selected Essays on Constitutional Law* (1938), 516; Goldsmith and Winks, *Price Fixing: From Nebbia to Guffey*, 31 Ill. L. Rev. 179 (1936), 2 *Selected Essays on Constitutional Law* (1938), 531.

## Section 3.—The Regulation of Industrial Relations.

## HOLDEN v. HARDY.

Supreme Court of the United States, 1898.  
169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383.

[Holden was convicted before a justice of the peace in Utah on charges of having employed workmen more than eight hours a day, one in an underground mine and another in an ore reduction plant, in violation of a statute which made eight hours the maximum per day for such employment "except in cases of emergency where life

or property is in imminent danger." No emergency was shown. From a denial by the State Supreme Court of a writ of habeas corpus this writ of error was taken.]

MR. JUSTICE BROWN delivered the opinion of the Court. \* \* \*

An examination \* \* \* of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that Amendment, this Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science \* \* \*. [Various law reforms are here mentioned.]

This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the Fourteenth Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California*, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible, and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land.

Of course, it is impossible to forecast the character or extent of these changes; but in view of the fact that, from the day *Magna Charta* was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employés, as they arise. \* \* \*

Recognizing the difficulty in defining with exactness the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with

respect to property, or having as their object the acquisition of property, would be equally invalid. \* \* \*

This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this Court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97, and *Yick Wo v. Hopkins*, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele*, 152 U. S. 133, 136. \* \* \*

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings; a municipal inspection of boilers; and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact; for the cleanliness and ventilation of working rooms; for the guarding of well holes, stairways, elevator shafts; and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls; for ventilation shafts, bore holes, escapement shafts, means of signaling the surface; for the supply of fresh air, and the elimination, as far as possible, of dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage; that cages shall be covered; and that there shall be

fences and gates around the top of shafts, besides other similar precautions. \* \* \*

But, if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. With this end in view, quarantine laws have been enacted in most, if not all, of the states; insane asylums, public hospitals, and institutions for the care and education of the blind established; and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other states laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld. \* \* \*

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés; and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the processes of refining or smelting. \* \* \*

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defense is not

so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employés, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employés, and there are reasonable grounds for believing that such determination is supported by the facts. \* \* \*

Affirmed.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

### LOCHNER v. NEW YORK.

Supreme Court of the United States, 1905.

198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. 539, 3 Ann. Cas. 1133.

[On writ of error to review a judgment of the New York Court of Appeals which had affirmed a judgment of a lower court convicting Lochner for requiring and permitting employees in his bakery and confectionery to work in excess of a statutory limit. The statute applied only to bakeries and confectioneries and limited employment therein to not more than sixty hours per week or ten hours in one day.]

MR. JUSTICE PECKHAM delivered the opinion of the Court. \* \* \*

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of

which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley v. Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment.

\* \* \*

This Court has recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this Court is that of *Holden v. Hardy*, 169 U. S. 366.

\* \* \*

It will be observed that, even with regard to that class of labor, the Utah statute [in that case] provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this Court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden v. Hardy* which covers the case now before us.

\* \* \*

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the

question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the Court. \* \* \*

Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

\* \* \*

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. \* \* \*

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real-estate, and many other kinds of business, aided by many clerks, messengers, and other employés. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real-estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health;

it has reference to the health of the employé condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme.

We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employés, if the hours of labor are not curtailed.

\* \* \*

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. \* \* \* It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. \* \* \* It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés

(all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution. \* \* \* Reversed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting: \* \* \* I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. \* \* \*

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. \* \* \*

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States.  
\* \* \*

MR. JUSTICE HOLMES, dissenting. I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this Court. *Northern Securities Co. v. United States*, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the *Constitution of California*. *Otis v. Parker*, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. *Holden v. Hardy*, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty," in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man

might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

#### NOTE

1. The dissenting opinions of Mr. Justice Harlan and of Mr. Justice Holmes in this well-known case have been set out not only because they represent the judicial view which was ultimately to prevail as regards the proper limits of the police power in the matter of state regulation of hours of labor in industry, but because the Holmes dissent is perhaps the most celebrated exposition of his juridical philosophy in cases involving legislation challenged under the Fourteenth Amendment.

#### MULLER v. OREGON.

Supreme Court of the United States, 1908.

208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. 324, 13 Ann. Cas. 957.

[The case involved the validity of the following Oregon statute: "No female shall be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day."]

MR. JUSTICE BREWER delivered the opinion of the Court. \* \* \*

The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. \* \* \*

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. \* \* \* Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in *Lochner v. New York*, 198 U. S. 45, that a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

\* \* \*

It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters. \* \* \*

The legislation and opinions referred to \* \* \* may not be, technically speaking, authorities, and in them is little or no discussion

of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge. \* \* \*

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As [sic] minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality.

Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though

all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her. \* \* \*

For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is Affirmed.

#### NOTES

1. In accord with the principal case: *Hawley v. Walker*, 232 U. S. 718, 58 L. ed. 813, 34 Sup. Ct. 479 (1914) (ten hour day for women in millinery establishments); *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. 469 (1914) (ten hour day for women in any manufacturing establishment and without deviation from schedule posted by proprietor); *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628, 35 Sup. Ct. 342, L. R. A. 1915F, 829 (1915) (eight hour day for women employed in hotels); *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. 345 (1915) (eight hour day for women employed in hospitals and not more than forty-eight hours in any one week); *Radice v. New York*, 264 U. S. 292, 68 L. ed. 690, 44 Sup. Ct. 325 (1924) (forbidding employment of women as cooks and waitresses in restaurants between 10 P. M. and 6 A. M.).

2. In *Sturges & Burn Manufacturing Co. v. Beauchamp*, 231 U. S. 320, 58 L. ed. 245, 34 Sup. Ct. 60, L. R. A. 1915A, 1196 (1913) an Illinois statute was sustained which prohibited the employment of children under the age of sixteen in various hazardous occupations and made the employer liable in damages for injuries upon a mere finding of violation of the statute without permitting the defense that the employer acted in good faith in relying upon the representation of the minor as to his age.

3. In *Bunting v. Oregon*, 243 U. S. 426, 61 L. ed. 830, 37 Sup. Ct. 435, Ann. Cas. 1918A, 1043 (1917) an Oregon statute fixing a ten-hour day for employees in mills, factories and manufacturing establishments in the state, but permitting a limited amount of overtime employment per day provided the employee was paid at the rate of time and one-half of the regular wage for such overtime, was

held to be constitutional. No reference was made to the *Lochner* decision. Chief Justice White and Justices Van Devanter and McReynolds dissented.

4. In *New York Central R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, 37 Sup. Ct. 247, L. R. A. 1917D 1, Ann. Cas. 1917D, 629 (1917), the New York Workmen's Compensation Act of 1914, which abolished the common-law remedy for personal injuries suffered by a workman in the course of his employment, substituted a schedule of awards for designated injuries, payable without regard to fault as a cause, and required employers either to carry liability insurance or post a bond to assure payment of awards, was held a valid exercise of the state's police power. The court said that "the subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare." The Washington Industrial Insurance Act of 1911, which differed from the New York statute in that compensation was to be paid to injured employees from a state fund maintained by compulsory contributions from employers, varying in amount from industry to industry, was sustained (with four dissents) in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. 260, Ann. Cas. 1917D, 642 (1917). An Arizona compulsory act which gave the injured employee the option of recovering compensation under the act or of suing for damages was upheld in the *Arizona Employers' Liability Cases* (*Arizona Copper Co. v. Hammer*), 250 U. S. 400, 63 L. ed. 1058, 39 Sup. Ct. 553, 6 A. L. R. 1537 (1919).

5. In *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. ed. 1245, 57 Sup. Ct. 868, 109 A. L. R. 1327 (1937) the tax upon employers of more than eight persons levied under the Unemployment Compensation Act of Alabama was sustained, the relief of unemployment being held a valid public purpose for which the tax could be exacted.

### WEST COAST HOTEL CO. v. PARRISH.

Supreme Court of the United States, 1937.

300 U. S. 379, 81 L. ed. 703, 57 Sup. Ct. 578, 108 A. L. R. 1330.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington), chap. 174; Remington's Rev. Stat. (1932), secs. 7623 et seq. It provides:

"Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful

to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women".

\* \* \*

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the State law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co.*, 185 Wash. 581. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital*, 261 U. S. 525, which held invalid the District of Columbia Minimum Wage Act which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel. *Adkins v. Lyons*, 261 U. S. 525, at p. 542.

The recent case of *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, came here on certiorari to the New York court which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case and that for that and other reasons the New York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." *Id.*, 298 U. S. p. 609. That view led to the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: "The petition for the writ sought review upon the ground that this case [*Morehead*] is distinguishable from that one [*Adkins*]. No application has been made

for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. \* \* \* Here the review granted was no broader than that sought by the petitioner. \* \* \* He is not entitled and does not ask to be heard upon the question whether the Adkins case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar." *Id.*, 298 U. S. 587, pp. 604, 605.

We think that the question which was not deemed to be open in the Morehead case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the Adkins case. \* \* \*

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case it had twice been held valid by the Supreme Court of the State. *Larsen v. Rice*, 100 Wash. 642; *Spokane Hotel Co. v. Younger*, 113 Wash. 359. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws of 1913 (Oregon), chap. 62. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara*, 69 Ore. 519, and *Simpson v. O'Hara*, 70 Ore. 261. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U. S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the Adkins case. Upon appeal the Court of Appeals of the District first affirmed that ruling but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with CHIEF JUSTICE TAFT, MR. JUSTICE HOLMES and MR. JUSTICE SANFORD dissenting, and MR. JUSTICE BRANDEIS taking no part. The dissenting opinions took the ground that the decision was at variance with the principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the Adkins case. The Justices who had dissented in that case bowed to the ruling and MR. JUSTICE BRANDEIS dissented. *Murphy v. Sardell*, 269 U. S. 530; *Donham v. West-Nelson Co.*, 273 U. S. 657. The question did not come before us again until the last term in the Morehead case, as already noted. In that case, briefs

supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. 298 U. S., p. 604, note. Throughout this entire period the Washington statute now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment has been broadly described:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549, 565.

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. \* \* \* [Citations omitted.]

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy*, 169 U. S. 366, where we pointed out the inequality in the footing of the parties. \* \* \*

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State

has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908), 208 U. S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. \* \* \* Again in *Quong Wing v. Kirkendall*, 223 U. S. 59, 63, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts*, 232 U. S. 671 (factories), *Miller v. Wilson*, 236 U. S. 373 (hotels), and *Bosley v. McLaughlin*, 236 U. S. 385 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U. S., p. 564. That challenge persists and is without any satisfactory answer. [After quoting from the dissenting opinions of CHIEF JUSTICE TAFT and JUSTICE HOLMES in the *Adkins* case, the opinion continues:]

We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus in *Radice v. New York*, 264 U. S. 292, we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman v. Hartford Fire Insurance Company*, 282 U. S. 251, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. \* \* \*

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those

who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. \* \* \* This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. \* \* \* Their relative need in the presence

of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins v. Children's Hospital*, supra, should be, and it is overruled. The judgment of the Supreme Court of the State of Washington is affirmed. Affirmed.

[JUSTICES VAN DEVANTER, McREYNOLDS, SUTHERLAND and BUTLER dissented.]

#### NOTE

1. Including the vote in the principal case, the Supreme Court voted six times on the constitutionality of laws establishing minimum wages for women. The first vote was in 1917 in *Stettler v. O'Hara* and *Simpson v. O'Hara*, 243 U. S. 629, 61 L. ed. 937, 37 Sup. Ct. 475 (1917), where the court, being evenly divided (due to the non-participation of Mr. Justice Brandeis, who had been of counsel in the cases below), affirmed the favorable judgments of the Oregon Supreme Court. Had Brandeis participated, the Oregon statute would undoubtedly have been held valid by a five-to-four vote, and a precedent would thus have been established for the validity of the legislation. The vote in *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. 394, 24 A. L. R. 1238 (1923), when the District of Columbia statute was invalidated, was five to three, Brandeis again not participating. In 1925 and 1927 minimum wage laws of Arizona and Arkansas were held invalid on the authority of the *Adkins* case. Mr. Justice Holmes stated that he voted with the majority solely on the principle of stare decisis. Mr. Justice Brandeis voted for constitutionality. Neither Chief Justice Taft nor Mr. Justice Sanford, who were in the minority in the *Adkins* decision, explained his vote for unconstitutionality. *Murphy v. Sardell*, 269 U. S. 530, 70 L. ed. 396, 46 Sup. Ct. 22 (1925); *Donham v. West-Nelson Mfg. Co.*, 273 U. S. 657, 71 L. ed. 825, 47 Sup. Ct. 343 (1927). In *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 80 L. ed. 1347, 56 Sup. Ct. 918, 103 A. L. R. 1445 (1936), holding unconstitutional the New York statute on the authority of the *Adkins* case, Mr. Justice Roberts voted with Justices Van Devanter, McReynolds, Sutherland and Butler to form a majority. Chief Justice Hughes dissented on the ground that the law was distinguishable from the District of Columbia statute and was not an arbitrary interference with freedom of contract. Justices Stone, Brandeis and Cardozo, dissenting, urged that the *Adkins* case should be overruled.

During this twenty year period seventeen Supreme Court justices voted on the question. Six voted for unconstitutionality and never changed their minds. Nine voted for constitutionality on their first opportunity to vote. Of these nine, three (Holmes, Taft and Sanford) afterwards voted on the other side. Stone first voted two times for unconstitutionality and twice later for constitutionality. Roberts voted first to follow the *Adkins* case and finally voted to overrule it. First or last, eleven voted for constitutionality and only six voted consistently the other way.

In *United States v. F. W. Darby Lumber Co.*, 312 U. S. 100, 85 L. ed. 609, 61 Sup. Ct. 451, 132 A. L. R. 1430 (1941) the federal Fair Labor Standards Act of 1938 prescribing minimum wages and maximum hours of labor for persons employed in interstate and foreign commerce and in the production of goods for interstate commerce, was held to be a valid exercise of congressional power. In answer to the contention that the statute deprived employers of liberty without due process of law in violation of the Fifth Amendment, all that Mr. Justice Stone, speaking for a unanimous court, said on this point was: "Since our decision in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, it is no longer open

to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. *Holden v. Hardy*, 169 U. S. 366; *Muller v. Oregon*, 208 U. S. 412; *Bunting v. Oregon*, 243 U. S. 426; *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612. Similarly the statute is not objectionable because applied alike to both men and women. Cf. *Bunting v. Oregon*, 243 U. S. 426."

See Powell, *The Judiciality of Minimum Wage Legislation*, 37 *Harv. L. Rev.* 545 (1924), 1 *Selected Essays on Constitutional Law* (1938), 553 (first portion), 2 *ibid.*, 716 (second portion).

LINCOLN FEDERAL LABOR UNION v. NORTHWESTERN  
IRON & METAL CO.  
WHITAKER v. NORTH CAROLINA.

Supreme Court of the United States, 1949.

335 U. S. 525, 93 L. ed. 212, 69 Sup. Ct. 251, 6 A. L. R. (2d) 473.

MR. JUSTICE BLACK delivered the opinion of the Court.

Under employment practices in the United States, employers have sometimes limited work opportunities to members of unions, sometimes to non-union members, and at other times have employed and kept their workers without regard to whether they were or were not members of a union. Employers are commanded to follow this latter employment practice in the states of North Carolina and Nebraska. A North Carolina statute and a Nebraska constitutional amendment provide that no person in those states shall be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization. To enforce this policy North Carolina and Nebraska employers are also forbidden to enter into contracts or agreements obligating themselves to exclude persons from employment because they are or are not labor union members.

These state laws were given timely challenge in North Carolina and Nebraska courts on the ground that insofar as they attempt to protect non-union members from discrimination, the laws are in violation of rights guaranteed employers, unions, and their members by the United States Constitution. The state laws were challenged as violations of the right of freedom of speech, of assembly and of petition guaranteed unions and their members by "the First Amendment and protected against invasion by the state under the Fourteenth Amendment." It was further contended that the state laws impaired the obligations of existing contracts in violation of Art. I, § 10, of the United States Constitution and deprived the appellant unions and employers of equal protection and due process of law guaranteed against state invasion by the Fourteenth Amendment. All of these contentions were rejected by the State Supreme Courts and the cases are here on appeal under § 237 of the Judicial Code, 28 U. S. C. § 344, [now § 1257]. The substantial

identity of the questions raised in the two cases prompted us to set them for argument together and for the same reason we now consider the cases in a single opinion.

*First.* It is contended that these state laws abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble and to petition the Government for a redress of grievances." Under the state policy adopted by these laws, employers must, other considerations being equal, give equal opportunities for remunerative work to union and non-union members without discrimination against either. In order to achieve this objective of equal opportunity for the two groups, employers are forbidden to make contracts which would obligate them to hire or keep none but union members. Nothing in the language of the laws indicates a purpose to prohibit speech, assembly, or petition. Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members. \* \* \*

We deem it unnecessary to elaborate the numerous reasons for our rejection of this contention of appellants. Nor need we appraise or analyze with particularity the rather startling ideas suggested to support some of the premises on which appellants' conclusions rest. There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not, or cannot, participate in union assemblies. The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly.

*Second.* There is a suggestion though not elaborated in briefs that these state laws conflict with Art. I, § 10, of the United States Constitution, insofar as they impair the obligation of contracts made prior to their enactment. That this contention is without merit is now too clearly established to require discussion. \* \* \*

*Third.* It is contended that the North Carolina and Nebraska laws deny unions and their members equal protection of the laws and thus offend the equal protection clause of the Fourteenth Amendment. Because the outlawed contracts are a useful incentive to the growth of union membership, it is said that these laws weaken the bargaining power of unions and correspondingly strengthen the power of employers. This may be true. But there are other matters to be considered. The state laws also make it impossible for an employer to make contracts with company unions which obligate the employer to refuse jobs to union

members. In this respect, these state laws protect the employment opportunities of members of independent unions. See *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248. This circumstance alone, without regard to others that need not be mentioned, is sufficient to support the state laws against a charge that they deny equal protection to unions as against employers and non-union workers.

It is also argued that the state laws do not provide protection for union members equal to that provided for non-union members. But in identical language these state laws forbid employers to discriminate against union and non-union members. Nebraska and North Carolina thus command equal employment opportunities for both groups of workers. It is precisely because these state laws command equal opportunities for both groups that appellants argue that the constitutionally protected rights of assembly and due process have been violated. For the constitutional protections surrounding these rights are relied on by appellants to support a contention that the Federal Constitution guarantees greater employment rights to union members than to non-union members. This claim of appellants is itself a refutation of the contention that the Nebraska and North Carolina laws fail to afford protection to union members equal to the protection afforded non-union workers.

*Fourth.* It is contended that these state laws deprive appellants of their liberty without due process of law in violation of the Fourteenth Amendment. Appellants argue that the laws are specifically designed to deprive all persons within the two states of "liberty" (1) to refuse to hire or retain any person in employment because he is or is not a union member, and (2) to make a contract or agreement to engage in such employment discrimination against union or non-union members.

Much of appellants' argument here seeks to establish that due process of law is denied employees and union men by that part of these state laws that forbids them to make contracts with the employer obligating him to refuse to hire or retain non-union workers. But that part of these laws does no more than provide a method to aid enforcement of the heart of the laws, namely, their command that employers must not discriminate against either union or non-union members because they are such. If the states have constitutional power to ban such discrimination by law, they also have power to ban contracts which if performed would bring about the prohibited discrimination. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 570, 571.

Many cases are cited by appellants in which this Court has said that in some instances the due process clause protects the liberty of persons to make contracts. But none of these cases, even those according the broadest constitutional protection to the making of contracts, ever went so far as to indicate that the due process clause bars a state from prohibiting contracts to engage in conduct banned by a valid state law. So here, if the provisions in the state laws against employer discrimination are valid, it follows that the contract prohibition also is valid. *Bayside*

*Fish Flour Co. v. Gentry*, 297 U. S. 422, 427. And see *Sage v. Hampe*, 235 U. S. 99, 104, 105. We therefore turn to the decisive question under the due process contention, which is: Does the due process clause forbid a state to pass laws clearly designed to safeguard the opportunity of non-union members to get and hold jobs, free from discrimination against them because they are non-union workers?

There was a period in which labor union members who wanted to get and hold jobs were the victims of widespread employer discrimination practices. Contracts between employers and their employees were used by employers to accomplish this anti-union employment discrimination. Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of "yellow dog contracts." This hostility of workers also prompted passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts.

In 1907 this Court in *Adair v. United States*, 208 U. S. 161, considered the federal law which prohibited discrimination against union workers. *Adair*, an agent of the Louisville & Nashville Railroad Company, had been indicted and convicted for having discharged Coppage, an employee of the railroad, because Coppage was a member of the Order of Locomotive Firemen. This Court there held, over the dissents of Justices McKenna and Holmes, that the railroad, because of the due process clause of the Fifth Amendment, had a constitutional right to discriminate against union members and could therefore do so through use of yellow dog contracts. The chief reliance for this holding was *Lochner v. New York*, 198 U. S. 45, which had invalidated a New York law prescribing maximum hours for work in bakeries. This Court had found support for its *Lochner* holding in what had been said in *Allgeyer v. Louisiana*, 165 U. S. 578, a case on which appellants here strongly rely. There were strong dissents in the *Adair* and *Lochner* cases.

In 1914 this Court reaffirmed the principles of the *Adair* case in *Coppage v. Kansas*, 236 U. S. 1, again over strong dissents, and held that a Kansas statute outlawing yellow dog contracts denied employers and employees a liberty to fix terms of employment. For this reason the law was held invalid under the due process clause.

The *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine was for some years followed by this Court. It was used to strike down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities. See cases cited in *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U. S. 236, 244-246, and *Osborn v. Ozlin*, 310 U. S. 53, 66, 67. And the same constitutional philosophy was faithfully adhered to in *Adams v. Tanner*, 244 U. S. 590, a case strongly pressed upon us by appellants. In *Adams*

v. Tanner, *supra*, this Court with four justices dissenting struck down a state law absolutely prohibiting maintenance of private employment agencies. The majority found that such businesses were highly beneficial to the public and upon this conclusion held that the state was without power to proscribe them. Our holding and opinion in *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, *supra*, clearly undermined *Adams v. Tanner*:

Appellants also rely heavily on certain language used in this Court's opinion in *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U. S. 522. In that case the Court invalidated a state law which in part provided a method for a state agency to fix wages and hours. See *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 267 U. S. 552, 565. In invalidating this part of the state act, this Court construed the due process clause as forbidding legislation to fix hours and wages, or to fix prices of products. The Court also relied on a distinction between businesses according to whether they were or were not "clothed with a public interest." [262 U. S. 522.] This latter distinction was rejected in *Nebbia v. New York*, 291 U. S. 502. That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* case, was settled as to price fixing in the *Nebbia* and *Olsen* Cases. That wages and hours can be fixed by law is no longer doubted since *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *United States v. Darby*, 312 U. S. 100, 125; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 187.

This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. \* \* \* Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers. Affirmed.

[MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE wrote separate concurring opinions.]

#### NOTES

1. In *American Federation of Labor v. American Sash & Door Co.*, 335 U. S. 538, 93 L. ed. 222, 69 Sup. Ct. 258, 6 A. L. R. (2d) 481 (1949), decided on the same day as the principal case, a similar provision in the Constitution of Arizona prohibiting discrimination against non-union workers but not expressly prohibiting discrimination against union workers, was upheld against attacks grounded on the due process and equal protection guaranties. In answer to the contention that the constitutional amendment violated the equal protection clause, the court pointed to the fact that Arizona had previously enacted "anti-yellow-dog contract" legislation making such agreements as a condition of getting or holding a job void and unenforceable. The court said: "We are satisfied that Arizona has attempted both in the anti-yellow-dog contract law and in the anti-discrimination constitutional amendment to strike at what were considered evils, to strike where those evils were most felt, and to strike in a manner that would effectively suppress the evils." Mr. Justice Murphy dissented.

2. The Railway Labor Act of 1926, designed to prevent the interruption of interstate commerce by labor disputes and strikes on the railroads, provided for the voluntary submission of these disputes to arbitration, and, in the event of failure of adjustment and threatened interruption of essential transportation service, for a Board of Mediation and a temporary suspension of the right of either party to the dispute to change the existing status. Representatives for the purposes of the act were to be designated by employers and employees "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." In sustaining an injunction to prevent the violation of this latter provision, the court said: "It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. \* \* \* Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both." *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 Sup. Ct. 427 (1930).

3. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. ed. 893, 57 Sup. Ct. 615, 108 A. L. R. 1352 (1937) the Supreme Court sustained the National Labor Relations Act of 1935, which applied to employment in interstate and foreign commerce and to employment affecting such commerce. The act provided (§7) that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." It also provided (§8) that it should be "an unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed," or "to dominate or interfere with the formation or administration of any labor organization," or "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The National Labor Relations

Board, the adjudicating agency for the administration of the act, found that the steel company had engaged in unfair labor practices and ordered it to reinstate certain discharged employees and pay them wages for the time lost. The court sustained this order as one authorized by the statute. In holding that the statute as thus construed and applied did not violate the due process clause of the Fifth Amendment, the court said that the cases of *Adair v. United States* and *Coppage v. Kansas* (discussed in the principal case above) "are inapplicable to cases of this character." Any doubt as to the meaning of this statement was cleared up in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 85 L. ed. 1271, 61 Sup. Ct. 845, 133 A. L. R. 1217 (1941), where the court, in holding that the statute gave the National Labor Relations Board power to order the reemployment of certain striking employees after a strike had terminated, said: "We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1. \* \* \* The course of decisions in this court since *Adair v. United States*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, have completely sapped these cases of their authority."

From the time of the enactment of the National Labor Relations Act it was of course obvious that the so-called "yellow-dog contracts" involved in the *Adair* and *Coppage* cases were violative of that Act, in situations where the Act governed. The enforcement of such contracts in the federal courts was forbidden by the *Norris-La Guardia Anti-Injunction Act* of 1932 (29 U. S. C. §§ 101 *et seq.*). When the constitutionality of the National Labor Relations Act was upheld in the 1937 decision, it was perfectly clear that the philosophy underlying the *Adair* and *Coppage* cases no longer represented the view of the court. The statement in the *Phelps Dodge* opinion was a belated acknowledgment of that fact.

4. In *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 96 L. ed. 469, 72 Sup. Ct. 405 (1952) the court sustained the constitutionality of a Missouri statute providing that an employee may absent himself from employment for four hours on election day between the opening and closing of the polls without penalty or deduction of wages.

## Section 4.—The Guaranties of Free Speech, Press and Assembly.

### GITLOW v. NEW YORK.

Supreme Court of the United States, 1925.  
268 U. S. 652, 69 L. ed. 1138, 45 Sup. Ct. 625.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161. He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"§ 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence,

or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"§ 161. Advocacy of criminal anarchy. Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means \* \* \*.

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different states. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped

and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for the circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto. [The substance of the Manifesto may be summarized as follows:]

Coupled with a review of the rise of Socialism, it condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism," based on "the class struggle" and mobilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action," for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat," the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg were cited as instances of a development already verging on revolutionary action and suggestive of proletarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state. \* \* \*

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness, with the object of overthrowing organized government. These were also denied. \* \* \*

The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto

or of circumstances showing the likelihood of such a result, that the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2nd, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. \* \* \*

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

"The proletariat revolution and the Communist reconstruction of society—the *struggle for these*—is now indispensable. \* \* \* The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal government, political mass strikes directed

against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question.

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 *Story on the Constitution*, 5th ed., § 1580, p. 634; *Robertson v. Baldwin*, 165 U. S. 275, 281; *Patterson v. Colorado*, 205 U. S. 454, 462; *Fox v. Washington*, 236 U. S. 273, 276; *Schenck v. United States*, 249 U. S. 47, 52; *Frohwerk v. United States*, 249 U. S. 204, 206; *Debs v. United States*, 249 U. S. 211, 213; *Schaefer v. United States*, 251 U. S. 466, 474; *Gilbert v. Minnesota*, 254 U. S. 325, 332; *Warren v. United States*, 183 Fed. 718, 721. Reasonably limited, it was said by *Story* in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. \* \* \*

By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. \* \* \* That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial,

because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency. \* \* \*

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in *Fox v. Washington*, supra, p. 277; *Abrams v. United States*, 250 U. S. 616, 624; *Schaefer v. United States*, supra, pp. 479, 480; *Pierce v. United States*, 252 U. S. 239, 250, 251; and *Gilbert v. Minnesota*, supra, p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such case it has been held that the general provisions of the statute may be constitutionally applied

to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck v. United States*, supra, p. 51; *Debs v. United States*, supra, pp. 215, 216. And the general statement in the *Schenck Case*, p. 52, that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. *Queen v. Most*, L. R. 7 Q. B. D. 244. \* \* \*

Affirmed.

MR. JUSTICE HOLMES, dissenting.

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full court in *Schenck v. United States*, 249 U. S. 47, 52, applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent." It is true that in my opinion this criterion was departed from in *Abrams v. United States*, 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and

Schaefer v. United States, 251 U. S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

#### NOTES

1. In *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. 556, 10 Ann. Cas. 689 (1907) and in *Gilbert v. Minnesota*, 254 U. S. 325, 65 L. ed. 287, 41 Sup. Ct. 125 (1920) the Supreme Court expressly declined to decide whether the Constitution of the United States imposed any limitation on a state in restricting speech. In *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 66 L. ed. 1044, 42 Sup. Ct. 516, 27 A. L. R. 27 (1922), Mr. Justice Pitney, for the court, said: "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes on the states any restriction about 'freedom of speech' \* \* \*."

2. The *Schenck*, *Frohwerk* and *Debs* cases, cited in the opinion in the principal case, were unsuccessful appeals from convictions for violating the Espionage Act of 1917, which forbade (§ 3) the wilful making of false statements with intent to interfere with military operations, the wilful causing of or attempt to cause insubordination, disloyalty, or mutiny, in the military forces, or the wilful obstruction of the recruiting or enlistment service. The philosophical approach of Justices Holmes and Brandeis to problems involved in governmental restriction of freedom of speech are set forth eloquently in their respective dissenting opinions in *Abrams v. United States*, 250 U. S. 616, 63 L. ed. 1173, 40 Sup. Ct. 17 (1919), and *Schaefer v. United States*, 251 U. S. 466, 64 L. ed. 360, 40 Sup. Ct. 259 (1920).

3. The most valuable work on the issues raised in the free speech cases is Chafee, *Free Speech in the United States* (1941). For a careful analysis of many of these cases, see the several articles by Green, *Liberty Under the Fourteenth*

Amendment, 27 Wash. Univ. L. Q. 497 (1942); 28 Wash. Univ. L. Q. 251 (1943); 43 Mich. L. Rev. 437 (1944).

### WHITNEY v. CALIFORNIA.

Supreme Court of the United States, 1927.  
274 U. S. 357, 71 L. ed. 1095, 47 Sup. Ct. 641.

MR. JUSTICE SANFORD delivered the opinion of the Court:

By a criminal information filed in the superior court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that state. Statutes 1919, chap. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the district court of appeal. 57 Cal. App. 449, 207 Pac. 698. Her petition to have the case heard by the Supreme Court was denied. *Id.* 453. And the case was brought here on a writ of error which was allowed by the presiding justice of the court of appeal, the highest court of the state in which a decision could be had. Judicial Code, § 237. \* \* \*

The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who: \* \* \* 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; \* \* \*

"Is guilty of a felony and punishable by imprisonment."

The first count of the information, on which the conviction was had, charged that on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act, "did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism." \* \* \*

1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the act, it is urged that the act, as here construed and applied, de-

prived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against her will, by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding, she failed to foresee the quality that others would give to the convention. The argument is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she "took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot;" that it was not until after the majority of the convention turned out to be "contrary minded, and other less temperate policies prevailed" that the convention could have taken on the character of criminal syndicalism; and that, as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury, —sustained by the court of appeal over the specific objection that it was not supported by the evidence,—is one of fact merely which is not open to review in this court, involving as it does no constitutional question whatever. \* \* \*

4. Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*, 268 U. S. 652, 666-668, and cases cited.

By enacting the provisions of the Syndicalism Act the state has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force,

violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the state, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U. S. 623, 661, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the state in the public interest. *Great Northern Railway v. Clara City*, 246 U. S. 434, 439.

The essence of the offense denounced by the act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See *People v. Steelik*, 187 Cal. 361, 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.

The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal Affirmed.

MR. JUSTICE BRANDEIS (concurring.) Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the

public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. See *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Gitlow v. New York*, 268 U. S. 652, 666; *Farrington v. Tokushige*, 273 U. S. 284. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. See *Schenck v. United States*, 249 U. S. 47, 52.

It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the legislature of California determined that question in the affirmative. Compare *Gitlow v. New York*, 268 U. S. 652, 668, 671. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily,

denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be a violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy,

must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly. \* \* \*

This legislative declaration [of emergency] satisfies the requirement of the Constitution of the state concerning emergency legislation. In *re McDermott*, 180 Cal. 783. But it does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal

Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied (*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282), the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed.

Our power of review in this case is limited not only to the question whether a right guaranteed by the federal Constitution was denied, *Murdock v. City of Memphis*, 20 Wall. 590; *Haire v. Rice*, 204 U. S. 291, 301; but to the particular claims duly made below, and denied. *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 485-488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. *Wiborg v. United States*, 163 U. S. 632, 658-660; *Clyatt v. United States*, 197 U. S. 207, 221-222. This is a writ of error to a state court. Because we may not inquire

into the errors now alleged I concur in affirming the judgment of the state court.

MR. JUSTICE HOLMES joins in this opinion.

#### NOTES

1. The Whitney case is discussed in Chafee, *Free Speech in the United States* (1941), 343-354. The defendant was pardoned by the Governor of California, who was influenced by the concurring opinion of Mr. Justice Brandeis.

2. In *Fiske v. Kansas*, 274 U. S. 380, 71 L. ed. 1108, 47 Sup. Ct. 655 (1927) it was held that the Kansas Criminal Syndicalism Act of 1920, as applied in that case to sustain the conviction of the defendant without any charge or evidence that the I. W. W., in which he secured members, advocated crime, violence or other unlawful acts or methods as a means of effecting political change or revolution, violated the defendant's liberty under the due process clause of the Fourteenth Amendment.

3. In *Stromberg v. California*, 283 U. S. 359, 75 L. ed. 1117, 51 Sup. Ct. 532, 73 A. L. R. 1484 (1931) the court held unconstitutional (Justices McReynolds and Butler dissenting) as a denial of the right of free speech and an impairment of liberty the first clause of a statute of California which made it a felony to display in any public place a red flag, banner or badge "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." The court, through Chief Justice Hughes, said: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

4. A Negro Communist organizer working among the Negro population in the South was convicted of violating a Georgia statute forbidding incitement or attempting incitement to insurrection by violence. There was no evidence that he had advocated by speech or written word, at meetings or elsewhere, any doctrine or action implying forcible subversion. There was, however, evidence tending to prove that he held meetings for the purpose of recruiting members of the Communist Party and solicited contributions for its support. Writings and printed matter found in a box carried by the defendant when arrested, it was contended, showed that the purposes of the Communist Party were to subvert by force and violence the lawful authority of the state. The Georgia Supreme Court sustained the conviction by construing the statute as not requiring a finding that defendant intended violence to take place instantly or at any given time, but that it was sufficient if he intended it to happen at any time, as a result of his influence. The Supreme Court of the United States reversed on two grounds: (1) there was no proof of incitement to insurrection, and for the statute, as applied, to make party membership and solicitation of members for the party a criminal offense, constituted an unwarranted invasion of the right of freedom of speech; and (2) the statute as construed and applied, did not furnish a sufficiently ascertainable standard of guilt. Justices Van Devanter, McReynolds, Sutherland and Butler dissented, holding that the statute did not unconstitutionally encroach upon freedom of speech, prescribed a sufficiently definite standard of guilt, and that the case fell within the scope of the "dangerous tendency" rule approved in the Gitlow case. *Herndon v. Lowry*, 301 U. S. 242, 81 L. ed. 1066, 57 Sup. Ct. 732 (1937).

## NEAR v. MINNESOTA EX REL. OLSON.

Supreme Court of the United States, 1931.

283 U. S. 697, 75 L. ed. 1357, 51 Sup. Ct. 625.

[A Minnesota statute of 1925 declared any person "engaged in the business of regularly or customarily producing, publishing or circulating \* \* \* (a) An obscene, lewd and lascivious newspaper, magazine or other periodical, or (b) A malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance and \* \* \* may be enjoined" by procedure usual in civil actions for an injunction.

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends \* \* \*"]

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.  
\* \* \*

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as "The Saturday Press," published by the defendants in the city of Minneapolis. \* \* \*

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.  
\* \* \*

[In the trial court the defendant pleaded that the statute was unconstitutional under the Constitution of the United States. On his appeal to the State Supreme Court from an adverse decision, the latter sustained the statute. A trial followed, in which defendant offered no

evidence, and a permanent injunction was granted, and the decree was affirmed by the State Supreme Court, and this appeal was taken.]

This statute, for the suppression of a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U. S. 652, 666; *Whitney v. California*, 274 U. S. 357, 362, 373; *Fiske v. Kansas*, 274 U. S. 380, 382; *Stromberg v. California*, 283 U. S. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. \* \* \* Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California*, supra; *Stromberg v. California*, supra. Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty. \* \* \*

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and for justifiable ends. It is apparent that under the statute the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute,

bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. \* \* \*

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. \* \* \*

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish

him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado*, 205 U. S. 454; *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419. In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439." *Schenck v. United States*, *supra*. These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country has broadened

with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. \* \* \*

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship.

\* \* \*

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. \* \* \* There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. \* \* \*

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. \* \* \*

Judgment reversed.

MR. JUSTICE BUTLER delivered a dissenting opinion in which JUSTICES VAN DEVANTER, McREYNOLDS and SUTHERLAND concurred.

## NOTES

1. In *Grosjean v. American Press Co.*, 297 U. S. 233, 80 L. ed. 660, 56 Sup. Ct. 444 (1936) a Louisiana tax of 2% of the gross receipts derived from the publication of advertisements by any "newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week" was held invalid, as applied to newspapers. The free press immunity was defined as including immunity from such a tax, which the court said was imposed "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."

2. In sustaining the application of the National Labor Relations Act to the Associated Press, which had been ordered by the National Labor Relations Board to desist from certain labor practices and to reinstate a discharged employee,

the Supreme Court held that the statute did not abridge freedom of the press. Mr. Justice Roberts, for the court, said: "The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt." Justices Sutherland, Van Devanter, McReynolds and Butler dissented. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 81 L. ed. 953, 57 Sup. Ct. 650 (1937).

3. The publisher of a newspaper, which prior to the licensing of a nearby radio station enjoyed a substantial local monopoly of the mass dissemination of news and advertising, was enjoined from refusing to accept local advertising from customers who also advertised through the radio station, thereby endangering the continued existence of the station. In *Lorain Journal Co. v. United States*, 342 U. S. 143, 96 L. ed. 162, 72 Sup. Ct. 181 (1951) the Supreme Court held that the publisher's conduct was an attempt to monopolize interstate commerce, violated the Sherman Act, and that the injunction did not infringe the freedom of the press as a prior restraint upon what it might publish.

4. In holding that the Federal Communication Commission's responsibility to achieve the "public interest" in its licensing of radio stations justified it in exercising control over network practices found to be detrimental to the public interest, even though the Communications Act of 1934 did not expressly give the Commission power to regulate the contractual relations between the stations and the networks, the court said, through Mr. Justice Frankfurter: "The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the act, is not a denial of free speech." *National Broadcasting Co. v. United States*, 319 U. S. 190, 226-227, 87 L. ed. 1344, 63 Sup. Ct. 997 (1943).

5. The postal power of Congress is limited by the guaranty of freedom of the press. See *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U. S. 407, 65 L. ed. 704, 41 Sup. Ct. 352 (1921); *Hannegan v. Esquire*, 327 U. S. 146, 90 L. ed. 586, 66 Sup. Ct. 456 (1946).

### BURSTYN, INC. v. WILSON.

Supreme Court of the United States, 1952.  
343 U. S. 495, 96 L. ed. 1098, 72 Sup. Ct. 777.

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue here is the constitutionality, under the First and Fourteenth Amendments, of a New York statute which permits the banning of motion picture films on the ground that they are "sacrilegious." That statute makes it unlawful "to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel [with specified exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department \* \* \*." The statute further provides:

"The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto."

Appellant is a corporation engaged in the business of distributing motion pictures. It owns the exclusive rights to distribute throughout the United States a film produced in Italy entitled "The Miracle." On November 30, 1950, after having examined the picture, the motion picture division of the New York education department, acting under the statute quoted above, issued to appellant a license authorizing exhibition of "The Miracle," with English subtitles, as one part of a trilogy called "Ways of Love." Thereafter, for a period of approximately eight weeks, "Ways of Love" was exhibited publicly in a motion picture theater in New York City under an agreement between appellant and the owner of the theater whereby appellant received a stated percentage of the admission price.

During this period, the New York State Board of Regents, which by statute is made the head of the education department, received "hundreds of letters, telegrams, post cards, affidavits and other communications" both protesting against and defending the public exhibition of "The Miracle." The Chancellor of the Board of Regents requested three members of the Board to view the picture and to make a report to the entire Board. After viewing the film, this committee reported to the Board that in its opinion there was basis for the claim that the picture was "sacrilegious." Thereafter, on January 19, 1951, the Regents directed appellant to show cause, at a hearing to be held on January 30, why its license to show "The Miracle" should not be rescinded on that ground. Appellant appeared at this hearing, which was conducted by the same three-member committee of the Regents which had previously viewed the picture, and challenged the jurisdiction of the committee and of the Regents to proceed with the case. With the consent of the committee, various interested persons and organizations submitted to it briefs and exhibits bearing upon the merits of the picture and upon the constitutional and statutory questions involved. On February 16, 1951, the Regents, after viewing "The Miracle," determined that it was "sacrilegious" and for that reason ordered the Commissioner of Education to rescind appellant's license to exhibit the picture. The Commissioner did so.

Appellant brought the present action in the New York courts to review the determination of the Regents. Among the claims advanced by appellant were (1) that the statute violates the Fourteenth Amendment as a prior restraint upon freedom of speech and of the press; (2) that it is invalid under the same Amendment as a violation of the guaranty of separate church and state and as a prohibition of the free exercise of religion; and, (3) that the term "sacrilegious" is so vague and indefinite as to offend due process. The Appellant Division rejected all of appellant's contentions and upheld the Regents' determination. 278 App. Div. 253, 104 N. Y. S. 2d 740. On appeal the New York Court of Appeals, two judges dissenting, affirmed the order of the Appellate Division. 303 N. Y. 242, 101 N. E. 2d 665. The case is here on appeal. 28 U. S. C. § 1257(2) [F. C. A. 28 § 1257(2)].

As we view the case, we need consider only appellant's contention that the New York statute is an unconstitutional abridgment of free speech and a free press. In *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U. S. 230, a distributor of motion pictures sought to enjoin the enforcement of an Ohio statute which required the prior approval of a board of censors before any motion picture could be publicly exhibited in the state, and which directed the board to approve only such films as it adjudged to be "of a moral, educational, or amusing and harmless character." The statute was assailed in part as an unconstitutional abridgment of the freedom of the press guaranteed by the First and Fourteenth Amendments. The District Court rejected this contention, stating that the first eight Amendments were not a restriction on state action. 215 F. 138, 141. On appeal to this Court, plaintiff in its brief abandoned this claim and contended merely that the statute in question violated the freedom of speech and publication guaranteed by the Constitution of Ohio. In affirming the decree of the District Court denying injunctive relief, this Court stated:

"It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion."

In a series of decisions beginning with *Gitlow v. New York*, 268 U. S. 652, this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. \* \* \*

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm.*, supra, is out of harmony with the views here set forth, we no longer adhere to it.

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge

the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697. The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." In the light of the First Amendment's history and of the *Near* decision, the state has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule \* \* \*." This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. *Cf. Kunz v. New York*, 340 U. S. 290. Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly-drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious." **Reversed.**

MR. JUSTICE REED, concurring in the judgment of the Court.

Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view.

[MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON joined, wrote a concurring opinion which is too lengthy for inclusion here. In their view, the term "sacrilegious," as used in the statute was unconstitutionally vague. MR. JUSTICE BURTON concurred in both the opinion of the Court and in that of MR. JUSTICE FRANKFURTER.]

#### NOTES

1. "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." Mr. Justice Douglas, for the court, in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166, 92 L. ed. 1260, 68 Sup. Ct. 915 (1948).

2. In *Gelling v. Texas*, 343 U. S. 960, 96 L. ed. 1359, 72 Sup. Ct. 1002 (1952), in a per curiam opinion, the court reversed a judgment of a Texas court and held invalid a city ordinance which authorized a local board of censors to deny permission for the showing of a motion picture, which in the opinion of the board was "of such character as to be prejudicial to the best interests of the people of said city," and made the showing of the picture after refusal of permission a misdemeanor. The opinion cited the principal case and *Winters v. New York*, 333 U. S. 507, 92 L. ed. 840, 68 Sup. Ct. 665 (1948), which had invalidated a criminal statute for vagueness.

3. In *Superior Films, Inc. v. Department of Education of Ohio*, and *Commercial Pictures Corporation v. Regents of University of New York*, 346 U. S. 587, 98 L. ed. 329, 74 Sup. Ct. 286 (1954) the Supreme Court reversed, per curiam, and citing the principal case, decisions of the Supreme Court of Ohio and the New York Court of Appeals upholding censorship of motion pictures in those states. The Ohio case involved the picture "M" which had been banned on the ground that it would tend to promote crime. The New York case involved the film "La Ronde" which had been banned on the ground that it was "immoral" and tended to corrupt morals. Justice Douglas, with whom Justice Black agreed, wrote a concurring opinion which stated: "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. The movie, like the public speech, radio, or television is transitory—here now and gone in an instant. The novel, the short story, the poem in printed form are permanently at hand to reenact the drama or to retell the story over and again. Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors. It is not for the censors to determine in any case. The First and the Fourteenth Amendments say that Congress and the States shall make 'no law' which abridges freedom of speech or of the press. In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take that step."

## SCHNEIDER v. NEW JERSEY, TOWN OF IRVINGTON.

Supreme Court of the United States, 1939.  
308 U. S. 147, 84 L. ed. 155, 60 Sup. Ct. 146.

[The opinion published under this title gave the Court's reasons for holding invalid city ordinances of Irvington, New Jersey, Los Angeles, California, Milwaukee, Wisconsin, and Worcester, Massachusetts. The Irvington ordinance required a distributor of circulars or other matter or a house-to-house canvasser or solicitor to first receive a permit from the chief of police, and set forth detailed requirements to be complied with before such permission would be granted. Here a minister of the Jehovah's Witnesses had been convicted of canvassing and distributing literature of that sect without having received a permit. The ordinances of Los Angeles, Milwaukee and Worcester were alike in forbidding distribution on the streets of pamphlets, hand-bills, circulars, posters or other printed matter. In the Los Angeles case a street distributor of a hand-bill announcing a meeting under the auspices of "Friends Lincoln Brigade" at which speakers were to discuss the civil war in Spain had been convicted. In Milwaukee a picket handing out hand-bills relating to a labor dispute had been convicted, and in Worcester the street distributor of a leaflet announcing a protest meeting with respect to the administration of state unemployment insurance met a like fate.]

MR. JUSTICE ROBERTS delivered the opinion of the Court. \* \* \*

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an

empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In *Lovell v. Griffin*, 303 U. S. 444, this Court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager. The opinion pointed out that the ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time or place of distribution. The Court said that, whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the ordinance was void on its face, because it abridged the freedom of the press. Similarly in *Hague v. C. I. O.*, 307 U. S. 496, an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places.

The Los Angeles, the Milwaukee, and the Worcester ordinances under review do not purport to license distribution but all of them absolutely prohibit it in the streets and, one of them, in other public places as well.

The motive of the legislation under attack \* \* \* is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence

of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

It is argued that the circumstance that in the actual enforcement of the Milwaukee ordinance the distributor is arrested only if those who receive the literature throw it in the streets, renders it valid. But, even as thus construed, the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech. As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

While it affects others, the Irvington ordinance drawn in question \* \* \* as construed below, affects all those, who, like the petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the "project" he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

As said in *Lovell v. Griffin*, *supra*, pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To

require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.

The judgment in each case is reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

[Mr. JUSTICE McREYNOLDS dissented.]

#### NOTES

1. The distribution of commercial advertising hand-bills on the public streets has no constitutional immunity. See *Valentine v. Chrestensen*, 316 U. S. 52, 86 L. ed. 1262, 62 Sup. Ct. 920 (1942), where it was also held that the addition to the commercial advertising matter of other material that of itself was privileged would not protect the distributor from punishment.

2. *Cox v. New Hampshire*, 312 U. S. 569, 85 L. ed. 1049, 61 Sup. Ct. 762, 133 A. L. R. 1396 (1941) upheld a conviction under a statute prohibiting organized parades on public streets without a permit, as applied to a parade of Jehovah's Witnesses, who had not sought such permission. The court held that the issuance of a permit was subject to reasonable discretion determined by public safety and convenience as to time, place and manner of such use of the streets, and that the statute was administered in a fair and non-discriminatory manner.

3. The view that the basic freedoms guaranteed by the First Amendment have a "preferred position" in constitutional law and that the normal presumption in favor of the constitutionality of regulatory legislation in the economic field does not obtain in cases where infringements of these guaranties are involved, is reflected in Mr. Justice Roberts' opinion in the principal case. This view is based upon the assumption that it was the intention of Justices Holmes and Brandeis to supplant the ordinary criterion of "reasonableness" by the "clear and present

danger" test in defining the constitutional immunity of freedom of speech. Thus, speech related to matters of public interest and concern may not be curtailed unless and until the speech brings about a clear and present danger of some serious substantive evil. To justify legislative restriction the state must show that a serious public interest is endangered and that no lesser form of control will suffice to protect such interest.

The first general, if somewhat tentative, statement of this view appeared in the famous footnote 4 appended by Mr. Justice Stone to his opinion for the court in *United States v. Carolene Products Co.*, 304 U. S. 144, 82 L. ed. 1234, 58 Sup. Ct. 778 (1938). Having noted in the main body of his opinion that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators," the footnote said, in part: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. \* \* \* It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. \* \* \* Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious \* \* \* or national \* \* \* or racial minorities, \* \* \* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Another expression of this view by the same jurist (then Chief Justice) appeared in the course of his dissent in *Jones v. Opelika*, 316 U. S. 584, 86 L. ed. 1691, 62 Sup. Ct. 1231, 141 A. L. R. 514 (1942), when he said: "The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it."

The student should consider, as he reads the opinions which follow in this and the succeeding section dealing with the religious liberty guaranty, what cases have been decided on the basis of the "preferred position" view and what cases have either ignored or repudiated it, what the attitude of the various justices has been with respect to it, and what support the view now (1955) has among the present members of the Supreme Court. Much valuable background and analysis of the cases involving the First Amendment guaranties is supplied in two recent volumes of Professor Pritchett, *The Roosevelt Court* (1948), and *Civil Liberties and the Vinson Court* (1954).

BRIDGES v. CALIFORNIA.  
TIMES-MIRROR CO. v. SUPERIOR COURT.

Supreme Court of the United States, 1941.  
314 U. S. 252, 86 L. ed. 192, 62 Sup. Ct. 190, 159 A. L. R. 1346.

MR. JUSTICE BLACK delivered the opinion of the Court.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. In the Superior Court, and later in the California Supreme Court, petitioners challenged the state's action as an abridgment, prohibited by the Federal Constitution, of freedom of speech and of the press; but the Superior Court overruled this contention, and the Supreme Court affirmed. The importance of the constitutional question prompted us to grant certiorari. 309 U. S. 649; 310 U. S. 623.

In brief, the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases not in all respects finally determined, upon the following chain of reasoning: California is invested with the power and duty to provide an adequate administration of justice; by virtue of this power and duty, it can take appropriate measures for providing fair judicial trials free from coercion or intimidation; included among such appropriate measures is the common-law procedure of punishing certain interferences and obstructions through contempt proceedings; this particular measure, devolving upon the courts of California by reason of their creation as courts, includes the power to punish for publications made outside the courtroom if they tend to interfere with the fair and orderly administration of justice in a pending case; the trial court having found that the publications had such a tendency, and there being substantial evidence to support the finding, the punishments here imposed were an appropriate exercise of the state's power; in so far as these punishments constitute a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum.

If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them. But even if such a conflict is not actually raised by the question before us, we are still confronted with the delicate problems entailed in passing upon the deliberations of the highest court of a state. This is not, however,

solely an issue between state and nation, as it would be if we were called upon to mediate in one of those troublous situations where each claims to be the repository of a particular sovereign power. To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law "abridging the freedom of speech or of the press" forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one.

It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v. Connecticut*, 310 U. S. 296, 307-308, such a "declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." *Id.* 308. Cf. *Herndon v. Lowry*, 301 U. S. 242, 261-264. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that "it must necessarily be found, as an original question," that the specified publications involved created "such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection." *Gitlow v. New York*, 268 U. S. 652, 671.

How much "likelihood" is another question, "a question of proximity and degree" that cannot be completely captured in a formula. In *Schenck v. United States*, however, this Court said that there must be a determination of whether or not "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils." We recognize that this statement, however helpful, does not comprehend the whole problem. As Mr. Justice Brandeis said in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 374: "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present."

Nevertheless, the "clear and present danger" language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck v. United States*, *supra*; *Abrams v. United States*, 250 U. S. 616; under a criminal syndicalism act, *Whitney v. California*, *supra*; under an "anti-insurrection" act, *Herndon v. Lowry*, *supra*;

and for breach of the peace at common law, *Cantwell v. Connecticut*, supra. And very recently we have also suggested that "clear and present danger" is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is "destruction of life or property, or invasion of the right of privacy." *Thornhill v. Alabama*, 310 U. S. 88, 105.

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," Brandeis, J., concurring in *Whitney v. California*, supra, 374; it must be "serious," id. 376. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U. S. 147, 161.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

Before analyzing the punished utterances and the circumstances surrounding their publication, we must consider an argument which, if valid, would destroy the relevance of the foregoing discussion to this case. In brief, this argument is that the publications here in question belong to a special category marked off by history,—a category to which the criteria of constitutional immunity from punishment used where other types of utterances are concerned are not applicable. For, the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. Fox, *Contempt of Court*, passim, e. g., 207. See also Stansbury, *Trial of James H. Peck*, 430. In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." Schofield, *Freedom of the Press in the United States*, 9 *Publications Amer. Sociol. Soc.*, 67, 76.

More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later

embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: "Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." 1 Annals of Congress 1789-1790, 434. And Madison elsewhere wrote that "the state of the press \* \* \* under the common law, cannot \* \* \* be the standard of its freedom in the United States." VI Writings of James Madison 1790-1802, 387.

There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

The implications of subsequent American history confirm such a construction of the First Amendment. To be sure, it occurred no more to the people who lived in the decades following Ratification than it would to us now that the power of courts to protect themselves from disturbances and disorder in the courtroom by use of contempt proceedings could seriously be challenged as conflicting with constitutionally secured guarantees of liberty. In both state and federal courts, this power has been universally recognized. See *Anderson v. Dunn*, 6 Wheat. 204, 227. But attempts to expand it in the post-Ratification years evoked popular reactions that bespeak a feeling of jealous solicitude for freedom of the press. In Pennsylvania and New York, for example, heated controversies arose over alleged abuses in the exercise of the contempt power, which in both places culminated in legislation practically forbidding summary punishment for publications. See

Nelles and King, Contempt by Publication, 28 Col. L. Rev. 401, 409-422. \* \* \*

We are aware that although some states have by statute or decision expressly repudiated the power of judges to punish publications as contempts on a finding of mere tendency to interfere with the orderly administration of justice in a pending case, other states have sanctioned the exercise of such a power. (See Nelles and King, *loc. cit. supra*, 536-562, for a collection and discussion of state cases.) But state power in this field was not tested in this Court for more than a century. Not until 1925, with the decision of *Gitlow v. New York*, *supra*, 268 U. S. 652, did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press.

History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.

We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively dis-

couraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a "reasonable tendency" to obstruct justice in a pending case.

This unfocused threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.

For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

The Los Angeles Times Editorials. The Times-Mirror Company, publisher of the Los Angeles Times, and L. D. Hotchkiss, its managing editor, were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined \$100. The company alone was held responsible for the other two, and was fined \$100 more on account of one, and \$300 more on account of the other.

The \$300 fine presumably marks the most serious offense. The editorial thus distinguished was entitled "Probation for Gorillas?" After vigorously denouncing two members of a labor union who had previously been found guilty of assaulting nonunion truck drivers, it closes with the observation: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill." Judge Scott had previously set a day (about a month after the publication) for passing upon the application of Shannon and Holmes for probation and for pronouncing sentence.

The basis for punishing the publication as contempt was by the trial court said to be its "inherent tendency" and by the Supreme Court its "reasonable tendency" to interfere with the orderly administration of justice in an action then before a court for consideration. In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case. To regard it, therefore, as in itself a substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor,—which we cannot accept as a major premise. \* \* \*

The other two editorials, publication of which was fined below, are set out in the lower margin. [Omitted here.] With respect to these two editorials, there is no divergence of conclusions among the members of this Court. We are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be

dismissed as negligible, and that the Constitution compels us to set aside the convictions as unpermissible exercises of the state's power. In view of the foregoing discussion of "Probation for Gorillas?", analysis of these editorials and their setting is deemed unnecessary.

The Bridges Telegram. While a motion for a new trial was pending in a case involving a dispute between an A. F. of L. union and a C. I. O. union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast; and concluded with the announcement that the C. I. O. union, representing some twelve thousand members, did "not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Apparently Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of that telegram fairly construed appears to be a statement that if the court's decree should be enforced there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that in any other way it would have run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

Moreover, this statement of Bridges was made to the Secretary of Labor, who is charged with official duties in connection with the prevention of strikes. Whatever the cause might be if a strike was threatened or possible the Secretary was entitled to receive all available information. Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment. \* \* \*

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of

them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425.

Reversed.

[MR. JUSTICE FRANKFURTER delivered a dissenting opinion in which CHIEF JUSTICE STONE, MR. JUSTICE ROBERTS and MR. JUSTICE BYRNES concurred.]

#### NOTE

1. The principal case was followed in *Pennekamp v. Florida*, 328 U. S. 331, 90 L. ed. 1295, 66 Sup. Ct. 1029 (1946) and *Craig v. Harney*, 331 U. S. 367, 91 L. ed. 1546, 67 Sup. Ct. 1249 (1947), the Supreme Court reversing convictions of contempt in both cases. Chief Justice Vinson and Justices Frankfurter and Jackson dissented in the latter case. The scope of the power to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions is discussed in *Nelles and King, Contempt by Publication*, 28 Col. L. Rev. 401 (1928). See also Note, 17 U. of Chi. L. Rev. 540 (1950).

#### DE JONGE v. OREGON.

Supreme Court of the United States, 1937.  
299 U. S. 353, 81 L. ed. 278, 57 Sup. Ct. 255.

[Dirk De Jonge was convicted on an indictment charging violation of the Oregon Criminal Syndicalism Law. The evidence showed that he was a member of the Communist Party; that he presided over and otherwise participated in the public meeting held in Portland, Oregon, under the auspices of the Communist Party; that the meeting was held to protest against illegal raids on workers' halls and homes, and against the shooting of striking longshoremen by the Portland police; and that at the meeting there were no unlawful acts done, nor any advocacy of criminal syndicalism. The Supreme Court of Oregon affirmed the conviction on the ground that there was evidence to show, and the indictment had charged, that the Communist Party at other times and places, in Oregon, had taught and advocated criminal syndicalism. De Jonge appealed to the Supreme Court of the United States.]

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

\* \* \*

While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. \* \* \*

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. \* \* \* The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States v. Cruikshank*, 92 U. S. 542, 552: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. *Hebert v. Louisiana*, 272 U. S. 312, 316; *Powell v. Alabama*, 287 U. S. 45, 67; *Grosjean v. American Press Co.*, 297 U. S. 233.

These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution

protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in the peaceable assembly and a lawful public discussion as the basis for a criminal charge.

We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty.

We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment. The judgment of conviction is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. Reversed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

#### NOTES

1. In *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 83 L. ed. 1423, 59 Sup. Ct. 954 (1939) the constitutional protection afforded to the rights of assembly and speech on public streets and in public parks was in issue. An ordinance of Jersey City, New Jersey, which forbade parades on public streets or public assemblies in public parks and public buildings without prior permission of a public official, who was required to grant such permission unless he concluded that rioting or disturbance of the peace would ensue, was held void on its face because the standard prescribed did not sufficiently restrain the discretion to be exercised by the official. Justices McReynolds and Butler dissented.

2. In recent years the introduction into political, religious and advertising campaigns of sound devices on the public streets and in parks and other public places in an effort to capture the attention of frequently unwilling listeners has resulted in the enactment of municipal ordinances for the purpose of prohibiting or restricting their use. An ordinance forbidding the use of any radio device, mechanical device or loud speaker on public streets or public places without permission of the chief of police was held invalid on its face, as applied to a Jehovah's Witness lecture, in *Saia v. New York*, 334 U. S. 558, 92 L. ed. 1574, 68 Sup. Ct. 1148 (1948). The court found that the ordinance established a previous restraint on the right of free speech, that it prescribed no standards for the control of administrative discretion, and thus had all the vices of regulations previously held invalid in *Lovell v. Griffin and Hague v. C. I. O.* Justices Reed, Frankfurter, Jackson and Burton dissented. The majority stressed the importance of the loud speaker in political campaigning and characterized it as an "indispensable instrument of effective public speech." The dissenting opinions

emphasized the intrusions of privacy resulting from loud noises and the importance of shielding the public from the abuses of sound equipment.

The following year, in *Kovacs v. Cooper*, 336 U. S. 77, 93 L. ed. 513, 69 Sup. Ct. 448, 10 A. L. R. (2d) 608 (1949), another five-to-four decision, the court upheld an ordinance forbidding altogether the use of sound amplifiers attached to vehicles which should emit loud or raucous noises, as a valid exercise of the police power in regulating the use of public streets. The dissenting justices (Black, Douglas, Murphy and Rutledge) viewed the decision as repudiating the *Saia* opinion and denying to speech amplifiers the constitutional shelter recognized in that decision. Mr. Justice Jackson, concurring, also agreed that the *Saia* doctrine had been repudiated. He added: "Comparison of this our 1949 decision with our 1948 decision, I think, will pretty hopelessly confuse municipal authorities as to what they may or may not do." For discussions of these cases, see Comment, 22 So. Cal. L. Rev. 416 (1949); Note, 58 Yale L. J. 335 (1949); Note, 3 Rutgers L. Rev. 250 (1949).

3. In *Public Utilities Commission v. Pollak*, 343 U. S. 451, 96 L. ed. 1068, 72 Sup. Ct. 813 (1952) the principal question was whether in the District of Columbia a street railway company was precluded from receiving and amplifying radio programs through loud speakers in its passenger vehicles. The programs consisted mainly of music interspersed with commercials. The Public Utilities Commission of the District, after notice, investigation and public hearings, concluded that this practice did not interfere with public convenience, comfort and safety, but tended to improve the public service. The Supreme Court, weighing the objections raised on behalf of the "captive audience," could discover under the circumstances no invasion of any right of privacy allegedly guaranteed by the due process clause of the Fifth Amendment or any asserted "freedom of attention" protected by the First Amendment. Mr. Justice Black concurred specially. Mr. Justice Douglas dissented. Mr. Justice Frankfurter, himself a member of the "captive audience," felt that his feelings were "so strongly engaged as a victim of the practice in controversy" that he should not participate.

### THOMAS v. COLLINS.

Supreme Court of the United States, 1945.

323 U. S. 516, 89 L. ed. 430, 65 Sup. Ct. 315.

[Section 5 of a Texas statute required every labor organizer to register with and procure an organizer's card from a designated state official before "soliciting" persons to join a labor union, and the statute authorized injunction proceedings to enforce it. As part of a campaign to organize the workers in a plant near Pelly, Texas, a mass meeting was arranged to be held in the city hall of that town. Thomas, a union official, went from Detroit to Pelly for the sole purpose of speaking at this meeting. Six hours before the meeting a restraining order was issued by a Texas court, enjoining Thomas from speaking without an organizer's card. He nevertheless spoke at the meeting without a card, and in the course of his speech urged his hearers generally to join a union and also asked an individual by name to become a member. A warrant issued for his arrest on a charge of contempt of the restraining order. By a habeas corpus proceeding his case eventually reached the Supreme Court of the United States. That

Court reversed a judgment of the Supreme Court of Texas which had affirmed a contempt sentence of three days in jail and a fine of \$100. The Texas court had sustained the statute on the theory that it "affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union."]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

\* \* \* Finally, as the case is presented here, Texas apparently would rest the validity of the judgment exclusively upon the specific individual solicitation of O'Sullivan, and would throw out of account the general invitation, made at the same time, to all nonunion workers in the audience. However, the case cannot be disposed of on such a basis. The Texas Supreme Court made no distinction between the general and the specific invitations. Nor did the District Court. The record shows that the restraining order was issued in explicit anticipation of the speech and to restrain Thomas from uttering in its course any language which could be taken as solicitation. The motion for the fiat in contempt was filed and the fiat itself was issued on account of both invitations. The order adjudging Thomas in contempt was in general terms, finding that he had violated the restraining order, without distinction between the solicitations set forth in the petition and proved as violations. The sentence was a single penalty. In this state of the record it must be taken that the order followed the prayer of the motion and the fiat's recital, and that the penalty was imposed on account of both invitations. The judgment therefore must be affirmed as to both or as to neither. \* \* \*

That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. Such regulation however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly.  
\* \* \*

In applying these principles to the facts of this case we put aside the broader contentions both parties have made and confine our decisions to the narrow question whether the application made of § 5 in this case contravenes the First Amendment.

The present application does not involve the solicitation of funds or property. Neither § 5 nor the restraining order purports to prohibit or regulate solicitation of funds, receipt of money, its management, distribution, or any other financial matter. Other sections of the Act deal with such things. And on the record Thomas neither asked nor accepted funds or property for the union at the time of his address or while he was in Texas. Neither did he "take applications" for membership, though he offered to do so "if it was necessary"; or ask anyone to join a union at any other time than the occasion of the Pelly mass meeting and in the course of his address.

Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. These also were the sole objects of the meeting. The campaign, and the meeting, were incidents of an impending election for collective bargaining agent, previously ordered by national authority pursuant to the guaranties of national law. \* \* \* The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done.

That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words "solicit," "invite," "join." It would be impossible to avoid the idea. The statute requires no specific formula. It is not contended that only the use of the word "solicit" would violate the prohibition. Without such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. That Thomas chose to meet the issue squarely, not to hide in ambiguous phrasing, does not counteract this fact. General words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience. How one might "laud unionism," as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case, which the State fails to meet because it cannot do so. Workmen do not lack capacity for making rational connections. They would understand, or some would, that the president of U. A. W. and vice president of C. I. O., addressing an organization meeting, was not urging merely a philosophic attachment to abstract principles of unionism, disconnected from the business immediately at hand. The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest attachment to the union by becoming a member. \* \* \*

The assembly was entirely peaceable, and had no other than a wholly lawful purpose. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare. Moreover, the State has shown no justification for placing restrictions on the use of the word "solicit." We have here nothing comparable to the case where use of the word "fire" in a

crowded theater creates a clear and present danger which the State may undertake to avoid or against which it may protect. *Schenck v. United States*, 249 U. S. 47. We cannot say that "solicit" in this setting is such a dangerous word. So far as free speech alone is concerned, there can be no ban or restriction or burden placed on the use of such a word except on showing of exceptional circumstances where the public safety, morality or health is involved or some other substantial interest of the community is at stake.

If therefore use of the word or language equivalent in meaning was illegal here, it was so only because the statute and the order forbade the particular speaker to utter it. When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment. \* \* \*

Apart from its "business practice" theory, the State contends that § 5 is not inconsistent with freedom of speech and assembly, since this is merely a previous identification requirement which, according to the state court's decision, gives the Secretary of State only "ministerial, not discretionary" authority.

How far the State can require previous identification by one who undertakes to exercise the rights secured by the First Amendment has been largely undetermined. \* \* \*

Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others. \* \* \*

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist

support for a lawful movement is quite incompatible with the requirements of the First Amendment. \* \* \*

The judgment is

Reversed.

[In a separate opinion Mr. JUSTICE JACKSON said: "I concur in the opinion of Mr. JUSTICE RUTLEDGE that this case falls in a category of a public speech, rather than that of practicing a vocation as solicitor." Taking the opposite view, four justices dissented. CHIEF JUSTICE STONE, and JUSTICES REED and FRANKFURTER joined in the dissenting opinion written by JUSTICE ROBERTS. They thought that there was insufficient reason for rejecting the view of the Texas court that the statute applied only to paid union organizers, and imposed no more than a reasonable requirement of registration for the purpose of identification, pointing out that under the statute, "No fee is charged. The card may be obtained by mail. To comply with the law the appellant need only have furnished his name and affiliation, and his credentials. The statute nowise regulates, curtails or bans his activities. \* \* \* If one disseminating news for his own profit may rightfully be required to identify himself, so may one who, for profit, solicits persons to join an organization."]

#### NOTES

1. In *Hill v. Florida ex rel. Watson*, 325 U. S. 538, 89 L. ed. 1782, 65 Sup. Ct. 1373 (1945) a Florida statute providing for the compulsory licensing of labor union business agents and requiring annual reports from unions was held to be inconsistent with the purposes of the National Labor Relations Act.

2. *United States v. Congress of Industrial Organizations*, 335 U. S. 106, 92 L. ed. 1849, 68 Sup. Ct. 1349 (1948) grew out of the provision in the Labor Management Relations Act of 1947 prohibiting expenditures by labor organizations in connection with federal elections. An indictment charging that defendant and its president violated this provision by publishing in its weekly periodical a statement by its president urging members to vote for a certain candidate for Congress was dismissed by a federal district court on the ground that it unconstitutionally abridged the freedoms of the First Amendment. On appeal by the government, the Supreme Court held by a five-judge majority that the publication did not violate the statute and thus avoided passing upon the constitutional issue. The concurring justices (Black, Douglas, Murphy and Rutledge), while agreeing that the indictment should be dismissed, said that the construction placed on the statute by the majority was unwarranted, that the constitutional issue should therefore be decided, and that by its "indiscriminate blanketing of every expenditure made in connection with an election" the statute operated as a prior restraint upon expression which infringed the First Amendment.

#### BEAUHARNAIS v. ILLINOIS.

Supreme Court of the United States, 1952.  
343 U. S. 250, 96 L. ed. 919, 72 Sup. Ct. 725.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The petitioner was convicted upon information in the Municipal Court of Chicago of violating § 224a of Division 1 of the Illinois

Penal Code, Ill. Rev. Stat. 1949, c. 38, § 471. He was fined \$200. The section provides:

"It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. \* \* \*

Beauharnais challenged the statute as violating the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment, and as too vague, under the restrictions implicit in the same Clause, to support conviction for crime. The Illinois courts rejected these contentions and sustained defendant's conviction. 408 Ill. 512, 97 N. E. 2d 343. We granted certiorari in view of the serious questions raised concerning the limitations imposed by the Fourteenth Amendment on the power of a State to punish utterances promoting friction among racial and religious groups. 342 U. S. 809.

The information, cast generally in the terms of the statute, charged that Beauharnais "did unlawfully \* \* \* exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes [*sic*] citizens of Illinois of the Negro race and color to contempt, derision, or obloquy \* \* \*." The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro \* \* \*." Below was a call for "One million self respecting white people in Chicago to unite \* \* \*" with the statement added that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions \* \* \* rapes, robberies, knives, guns and marijuana of the negro, surely will." This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.

The testimony at the trial was substantially undisputed. From it the jury could find that Beauharnais was president of the White Circle League; that, at a meeting on January 6, 1950, he passed out bundles of the lithographs in question, together with other literature, to volunteers for distribution on downtown Chicago street corners the following day; that he carefully organized that distribution, giving detailed instructions for it; and that the leaflets were in fact distributed on January 7 in accordance with his plan and instructions. The court,

together with other charges on burden of proof and the like, told the jury "if you find \* \* \* that the defendant, Joseph Beauharnais, did \* \* \* manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place the lithograph \* \* \* then you are to find the defendant guilty \* \* \*." He refused to charge the jury, as requested by the defendant, that in order to convict they must find "that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." Upon this evidence and these instructions, the jury brought in the conviction here for review.

The statute before us is not a catchall enactment left at large by the State court which applied it. *Cf. Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296, 307. It is a law specifically directed at a defined evil, its language drawing from history and practices in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. \* \* \*

The Illinois Supreme Court tells us that § 224a "is a form of criminal libel law." 408 Ill. 512, 517, 97 N. E. 2d 343, 346. The defendant, the trial court and the Supreme Court consistently treated it as such. The defendant offered evidence tending to prove the truth of parts of the utterance, and the courts below considered and disposed of this offer in terms of ordinary criminal libel precedents. Section 224a does not deal with the defense of truth, but by the Illinois Constitution, Art. II, § 4, S. H. A., "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." See also Ill. Rev. Stat. 1949, c. 38, § 404. Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other States. Moreover, the Supreme Court's characterization of the words prohibited by the statute as those "liable to cause violence and disorder" paraphrases the traditional justification for punishing libels criminally, namely their "tendency to cause breach of the peace."

Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment

of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U. S. 296, 309, 310." Such were the views of a unanimous Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, at pages 571-572.

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, user of marijuana. The precise question before us, then, is whether the protection of "liberty" in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities and flagrantly disseminated. There is even authority, however dubious, that such utterances were also crimes at common law. It is certainly clear that some American jurisdictions have sanctioned their punishment under ordinary criminal libel statutes. We cannot say, however, that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part. The law was passed on June 29, 1917, at a time when the State was struggling to assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups—foreign-born brought to it by the crest of the great wave of immigration, and Negroes attracted by jobs in war plants and the allurements of northern claims. Nine years earlier, in the very city where the legislature sat, what is said to be

the first northern race riot had cost the lives of six people, left hundreds of Negroes homeless and shocked citizens into action far beyond the borders of the State. Less than a month before the bill was enacted, East St. Louis had seen a day's rioting, prelude to an outbreak, only four days after the bill became law, so bloody that it led to Congressional investigation. A series of bombings had begun which was to culminate two years later in the awful race riot which held Chicago in its grip for seven days in the summer of 1919. Nor has tension and violence between the groups defined in the statute been limited in Illinois to clashes between whites and Negroes.

In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. \* \* \*

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. \* \* \*

Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 189. Such group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging to its members. It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as it does on his own merits. This being so, we are precluded from

saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

We are warned that the choice we permit the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party.

Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. "While this Court sits" it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.

The scope of the statute before us, as construed by the Illinois court, disposes of the contention that the conduct prohibited by the law is so ill-defined that judges and juries in applying the statute and men in acting cannot draw from it adequate standards to guide them. The clarifying construction and fixed usage which govern the meaning of the enactment before us were not present, so the Court found, in the New York law held invalid in *Winters v. New York*, 333 U. S. 507. Nor, thus construed and limited, is the act so broad that the general verdict of guilty on an indictment drawn in the statutory language might have been predicated on constitutionally protected conduct. On this score, the conviction here reviewed differs from those upset in *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, supra, and *Terminiello v. Chicago*, 337 U. S. 1. Even the latter case did not hold that the unconstitutionality of a statute is established *because* the speech prohibited by it raises a ruckus. \* \* \*

As to the defense of truth, Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made "with good motives and for justifiable ends." Ill. Const. Art. II, § 4. Both elements are necessary if the defense is to prevail. What has been called "the common sense of American criminal law," as formulated, with regard to necessary safeguards in criminal libel prosecutions, in the New York constitution of 1821, Art. VII, § 8, has been adopted in terms by Illinois. The teaching of a century and a half of criminal libel prosecutions in this country would go by the board if we were to hold that Illinois was not within her rights in making this combined requirement. Assuming that defendant's offer of proof directed to a part of the defense was adequate, it did not satisfy the entire requirement which Illinois could exact.

Libellous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts,

to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack. But it bears repeating—although it should not—that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.

Affirmed.

[The question as to whether the guaranty of free speech, protected by the First Amendment against abridgment by Congress, is included in the Fourteenth Amendment and hence equally protected against state action, was not dealt with in the opinion of the Court, which did not specifically rely on the First Amendment. MR. JUSTICE JACKSON, dissenting, answered this question in the negative, saying: "The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not." On the other hand, MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE DOUGLAS adhered to the view expressed in previous cases that the Fourteenth Amendment embodies the First Amendment guaranties. MR. JUSTICE JACKSON, while agreeing with the majority that a state has power to bring classes "of any race, color, creed, or religion" within the protection of its libel laws, dissented on the ground that the Illinois statute, as applied in the instant case, dispensed with accepted safeguards for the accused, in that rulings of the trial court precluded the defenses of truth, fair comment, and privilege, and that no probability of a "clear and present danger" was shown. MR. JUSTICE DOUGLAS, in a separate dissenting opinion, expressed the view that free speech has a preferred position as contrasted to some other civil rights. He said: "My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster." MR. JUSTICE REED, with whom MR. JUSTICE DOUGLAS also concurred, dissented on the ground that, assuming the power of a state to pass group libel laws, the conviction could not stand since the statute contained words of such ambiguous meaning and uncertain connotation as "virtue," "derision," or "obloquy." MR. JUSTICE BLACK, also with the concurrence of MR. JUSTICE DOUGLAS, held that the statute violated the right of free speech. Excerpts from this dissenting opinion follow.]

This case is here because Illinois inflicted criminal punishment on Beauharnais for causing the distribution of leaflets in the city of Chicago. The conviction rests on the leaflet's contents, not on the time, manner or place of distribution. Beauharnais is head of an organization that opposes amalgamation and favors segregation of white and colored people. After discussion, an assembly of his group decided to petition the mayor and council of Chicago to pass laws for segregation. Volunteer members of the group agreed to stand on street corners, solicit signers to petitions addressed to the city authorities, and distribute leaflets giving information about the group, its beliefs and its plans. In carrying out this program a solicitor handed out a leaflet which was the basis of this prosecution. \* \* \*

The Court's holding here and the constitutional doctrine behind it leave the rights of assembly, petition, speech and press almost completely at the mercy of state legislative, executive, and judicial agencies. I say "almost" because state curtailment of these freedoms may still be invalidated if a majority of this Court conclude that a particular infringement is "without reason," or is "a wilful and purposeless restriction unrelated to the peace and well being of the State." But lest this encouragement should give too much hope as to how and when this Court might protect these basic freedoms from state invasion, we are cautioned that state legislatures must be left free to "experiment" and to make "legislative" judgments. We are told that mistakes may be made during the legislative process of curbing public opinion. In such event the Court fortunately does not leave those mistakenly curbed, or any of us for that matter, unadvised. Consolation can be sought and must be found in the philosophical reflection that state legislative error in stifling speech and press "is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues." My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern. \* \* \*

The Court condones this expansive state censorship by painstakingly analogizing it to the law of criminal libel. As a result of this refined analysis, the Illinois statute emerges labeled a "group libel law." This label may make the Court's holding more palatable for those who sustain it, but the sugar-coating does not make the censorship less deadly. However tagged, the Illinois law is not that criminal libel which has been "defined, limited and constitutionally recognized time out of mind". For as "constitutionally recognized" that crime has provided for punishment of false, malicious, scurrilous charges against individuals, not against huge groups. This limited scope of the law of criminal

libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds. Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment. \* \* \* Unless I misread history the majority is giving libel a more expansive scope and more respectable status than it was ever accorded even in the Star Chamber. For here it is held to be punishable to give publicity to any picture, moving picture, play, drama or sketch, or any printed matter which a judge may find unduly offensive to any race, color, creed or religion. In other words, in arguing for or against the enactment of laws that may differently affect huge groups, it is now very dangerous indeed to say something critical of one of the groups. And any "person, firm or corporation" can be tried for this crime. "Person, firm or corporation" certainly includes a book publisher, newspaper, radio or television station, candidate or even a preacher. \* \* \*

This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches."

No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion. Today Beauharnais is punished for publicly expressing strong views in favor of segregation. Ironically enough, Beauharnais, convicted of crime in Chicago, would probably be given a hero's reception in many other localities, if not in some parts of Chicago itself. Moreover, the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation. What Beauharnais said in his leaflet is mild compared with usual arguments on both sides of racial controversies.

We are told that freedom of petition and discussion are in no danger "while this Court sits." This case raises considerable doubt. Since those who peacefully petition for changes in the law are not to be protected "while this Court sits," who is? I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case-by-case, day-by-day majority of this Court. I had supposed that our people could rely for their freedom on the Constitution's commands, rather than on the grace of this Court on an individual case basis. To say that a legislative body can, with this Court's approval, make it a crime to petition for and publicly discuss proposed legislation seems as farfetched to me as it would be to say

that a valid law could be enacted to punish a candidate for President for telling the people his views. I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whercases." Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship. This method of decision offers little protection to First Amendment liberties "while this Court sits."

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark:

"Another such victory and I am undone."

#### NOTES

1. In *Chaplinsky v. New Hampshire*, 315 U. S. 568, 86 L. ed. 1031, 62 Sup. Ct. 766 (1942) the court upheld the power of a state to punish, by a statute "narrowly drawn," one who addresses "fighting words" to another, *i. e.*, offensive or derisive words plainly tending to provoke the addressee to acts of violence.

2. A speaker at a meeting which was itself the occasion of a public disturbance requiring police intervention, incited resentment against a crowd gathered outside to protest the meeting by attacking various political and racial groups, was convicted of violating an ordinance which provided that "all persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace" should be deemed guilty of disorderly conduct. In charging the jury the trial court said that "breach of the peace" included a speech which stirred people to anger, invited public dispute or brought about a condition of unrest, or created a disturbance. This construction, to which no objection was taken either in the trial court or in the state appellate court, was held by a five-to-four majority of the Supreme Court to render the ordinance an infringement of the guaranty of free speech; and the fact that a conviction for violating possibly valid provisions of the ordinance may have been warranted by the evidence was held immaterial, since the verdict was a general one and might have rested on the invalid clauses. Chief Justice Vinson and Justices Frankfurter, Jackson and Burton dissented. *Terminiello v. Chicago*, 337 U. S. 1, 93 L. ed. 1131, 69 Sup. Ct. 894 (1949). See discussions of the case in 16 U. of Chi. L. Rev. 328 (1948), 49 Col. L. Rev. 1118 (1949), and 23 So. Cal. L. Rev. 356 (1950).

3. In *Feiner v. New York*, 340 U. S. 315, 95 L. ed. 295, 71 Sup. Ct. 303 (1951) a college student was convicted of disorderly conduct for making a speech on a street corner in Syracuse to publicize a meeting of the Young Progressives of America, his voice being carried over a loud-speaker system. His remarks—"in a loud, high pitched voice"—were derogatory of various public officials and the American Legion, and included an appeal to Negroes "to rise up in arms and fight for their rights." Some members of the audience expressed resentment and at least one threatened violence if the police did not act. The speaker was arrested after twice ignoring requests of the police to stop talking. A six-judge majority of the Supreme Court upheld this conviction on the ground that a clear danger of disorder was threatened and hence the action taken to preserve peace and order on the streets was no violation of defendant's right of free speech. Justice Black, dissenting, expressed the view that the defendant

had been convicted for espousal of unpopular opinions. Justices Douglas and Minton, dissenting, denied that the record showed any likelihood of riot. "It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech."

### THORNHILL v. ALABAMA.

Supreme Court of the United States, 1940.

310 U. S. 88, 84 L. ed. 1093, 60 Sup. Ct. 736.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of § 3448 of the State Code of 1923. The Code section reads as follows:

"Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner is phrased substantially in the very words of the statute. The first and second counts charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring [its] lawful business." [Thornhill's conviction was affirmed by the Alabama Court of Appeals over his contention that § 3448 deprived him of the "right of peaceful assemblage," the "right of freedom of speech," and the "right to petition for redress."]

The proofs consist of the testimony of two witnesses for the prosecution. It appears that petitioner on the morning of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, apparently affiliated with the American Federation of Labor, which had as mem-

bers all but four of the approximately one hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who testified: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man." For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. \* \* \*

Third. Section 3448 has been applied by the state courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to

patronize the employer. *O'Rourke v. Birmingham*, 27 Ala. App. 133; 168 So. 206, cert. denied, 232 Ala. 355; 168 So. 209. The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

The numerous forms of conduct proscribed by § 3448 are subsumed under two offenses: the first embraces the activities of all who "without just cause or legal excuse" "go near to or loiter about the premises" of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who "picket" the place of business of any such person "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another." It is apparent that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase "without just cause or legal excuse" does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. \* \* \*

Fourth. We think that § 3448 is invalid on its face.

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. \* \* \* Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U. S. 496; *Schneider v. State*, 308 U. S. 147, 155, 162-63. See *Senn v. Tile Layers Union*, 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indis-

pensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." \* \* \*

The range of activities proscribed by § 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in § 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries v. Tri-City Council*, 257 U. S. 184, 205. Section

3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.

It is not enough to say that § 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute. "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U. S. 147, 161, 163; *Hague v. C. I. O.*, 307 U. S. 496, 515-16. The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by § 3448.

Reversed.

MR. JUSTICE McREYNOLDS is of the opinion that the judgment below should be affirmed.

#### NOTES

1. It is to be noted that the opinion in the *Thornhill* case concedes that picketing might on occasion take the form of mass intimidation and violence and hence is subject to reasonable regulation in the public interest. In *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. ed. 836, 61 Sup. Ct. 552, 132 A. L. R. 1200 (1941), the Supreme Court upheld an Illinois injunction banning all picketing on the ground that the facts disclosed that the picketing was "set in a background of violence," and that the acts of violence were "neither episodic nor isolated." Justices Black, Reed and Douglas dissented.

2. That picketing—even peaceful picketing—is more than merely the dissemination of information concerning the facts of a labor dispute but is a species of coercion, since it involves patrol of the establishment picketed and may cut down its patronage, has been pointed out by many commentators. For discussions from various viewpoints of the problems involved, see Gregory, *Peaceful Picketing and Freedom of Speech*, 26 Am. Bar Assn. J. 709 (1940); Gregory, *Labor and the Law* (1941), 341 *et seq.*; Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513 (1943); Teller, *Picketing and Free Speech: A Reply*, 56 Harv. L. Rev. 532 (1943); Armstrong, *Where Are We Going with Picketing?* 36 Cal. L. Rev. 1, 30-34 (1948).

3. In *Carlson v. California*, 310 U. S. 106, 84 L. ed. 1104, 60 Sup. Ct. 746 (1940), the doctrine of the principal case was applied to invalidate a statute forbidding the display of banners in the vicinity of any factory or place of business or employment for the purpose of influencing any person to refrain from entering therein, or to refrain from purchasing goods manufactured or sold therein, or to refrain from performing labor therein.

4. In *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. ed. 855, 61 Sup. Ct. 568 (1941) the court invalidated a state labor injunction which had been granted in furtherance of the state's common-law policy forbidding resort to peaceful picketing where there was no immediate employer-employee relationship. The purpose of the picketing was to compel an employer, none of whose

employees was a union member, to establish a union shop. In reaffirming the Thornhill doctrine, the court said that the right of free communication could not "be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." The same result was reached in *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 88 L. ed. 58, 64 Sup. Ct. 126 (1943), holding that a state could not prohibit peaceful picketing merely because no "labor dispute" was involved, the picketed shop here being operated by its proprietors without employees.

5. In *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722, 86 L. ed. 1143, 62 Sup. Ct. 807 (1942), where a union had been enjoined from picketing a restaurant in order to induce its owner to cease employing an open shop contractor in the construction of a building a mile and a half away, the court held (Justices Black, Reed, Douglas and Murphy dissenting) that it was permissible for a state to forbid the "conscription of neutrals" by confining "the sphere of communication to that directly related to the dispute." The constitutional immunity was held to extend, however, to the picketing of a manufacturing baker to induce him to cease selling to non-union peddlers who resold and delivered to small retailers, keeping the difference between cost and selling price. *Bakery & Pastry Drivers Local v. Wohl*, 315 U. S. 769, 86 L. ed. 1178, 62 Sup. Ct. 816 (1942).

6. In several recent cases the Supreme Court has retreated from the doctrine of the Thornhill case by upholding decrees of state courts enjoining picketing in labor disputes, even though peaceful, where the *objective* sought by the pickets was not deemed to be legitimate: *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 93 L. ed. 834, 69 Sup. Ct. 684 (1949) (upholding an injunction of a Missouri court against picketing designed to force an employer to violate the state's statute against restraint of trade); *Hughes v. Superior Court*, 339 U. S. 460, 94 L. ed. 985, 70 Sup. Ct. 718 (1950) (affirming an injunction of a California court against picketing of a grocery store in order to secure compliance with a demand that the owner follow the policy of selective hiring of Negro clerks, the hiring to be based on the proportion of white and Negro customers of the store, a purpose considered by the state court as being contrary to state policy against racial discrimination in private employment); *Building Service Employees International Union v. Gazzam*, 339 U. S. 532, 94 L. ed. 1045, 70 Sup. Ct. 784 (1950) (holding that a state may enjoin picketing for the purpose of coercing an employer to bring pressure upon his employees to join a union, where a state statute declares a public policy against employer coercion of employees' choice of their bargaining representative, even though no sanctions are provided to enforce such policy); *International Brotherhood of Teamsters v. Hanke*, 339 U. S. 470, 94 L. ed. 995, 70 Sup. Ct. 773, 13 A. L. R. (2d) 631 (1950) (upholding, over dissents of Justices Black, Reed and Minton, an injunction granted by a Washington court against picketing designed to force the operator of an automobile repair shop and service station, who hired no employees and belonged to no union, to comply with union rules as to closing hours and observance of holidays); *Local Union No. 10, United Association of Journeyman Plumbers and Steamfitters v. Graham*, 345 U. S. 192, 97 L. ed. 946, 73 Sup. Ct. 585 (1953) (upholding, on the authority of previous decisions, a decree of a Virginia court restraining labor unions from peaceful picketing carried on for the purpose of coercing an employer to discharge non-union employees, contrary to a state "Right to Work" statute prohibiting an agreement between an employer and a labor union whereby non-union workers would be deprived the right to work for the employer, or union membership was made a condition of employment; Justices Black and Douglas dissenting).

7. For discussions of Supreme Court decisions limiting the Thornhill doctrine, see Cox, *Strikes, Picketing and the Constitution*, 4 Vand. L. Rev. 574

(1951); Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191 (1950); Howard, *The Unlawful Purpose Doctrine in Peaceful Picketing and Its Application in the California Cases*, 24 So. Cal. L. Rev. 145 (1951); Note, *Picketing and Free Speech—The Gazzam, Hanke and Hughes Cases*, 26 N. Y. U. L. Rev. 183 (1951); Note, *Thornhill Re-examined*, 49 Mich. L. Rev. 1048 (1951); Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 U. of Pa. L. Rev. 995 (1954).

### WIEMAN v. UPDEGRAFF.

Supreme Court of the United States, 1952.  
344 U. S. 183, 97 L. ed. 216, 73 Sup. Ct. 215.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of Oklahoma, *Board of Regents v. Updegraff*, 205 Okl. 301, 237 P. 2d 131, upholding the validity of a loyalty oath prescribed by Oklahoma statute for all state officers and employees. Okl. Stat. 1950, Tit. 51, §§ 37.1-37.8. Appellants, employed by the state as members of the faculty and staff of Oklahoma Agricultural and Mechanical College, failed, within the thirty days permitted, to take the oath required by the Act. Appellee Updegraff, as a citizen and taxpayer, thereupon brought this suit in the District Court of Oklahoma County to enjoin the necessary state officials from paying further compensation to employees who had not subscribed to the oath. The appellants, who were permitted to intervene, attacked the validity of the Act on the grounds, among others, that it was a bill of attainder; an ex post facto law; impaired the obligation of their contracts with the State and violated the Due Process Clause of the Fourteenth Amendment. They also sought a mandatory injunction directing the state officers to pay their salaries regardless of their failure to take the oath. Their objections centered largely on the following clauses of the oath:

"\* \* \* That I am not affiliated directly or indirectly \* \* \* with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; \* \* \* that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of \* \* \* any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization \* \* \*."

The court upheld the Act and enjoined the state officers from making further salary payments to appellants. The Supreme Court of Okla-

homa affirmed, sub nom. Board of Regents v. Updegraff, 205 Okl. 301, 237 P. 2d 131. We noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents.

The District Court of Oklahoma County in holding the Act valid concluded that the appellants were compelled to take the oath as written; that the appellants "and each of them, did not take and subscribe to the oath as provided in Section 2 of the Act and wilfully refused to take that oath and by reason thereof the Board of Regents is enjoined from paying them, and their employment is terminated." In affirming, the Supreme Court of Oklahoma held that the phrase of the oath "any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization" actually "refers to a list or lists of such organizations in existence at the time of the passage of the act which had been prepared by the Attorney General [of the United States] under Governmental directive. Such list or lists are in effect made a part of the oath by reference." On this point the opinion continues: "There is no requirement in the act that an oath be taken of non-membership in organizations not on the list of the Attorney General of the United States at the time of the passage of this act."

We read this part of the highest state court's decision as limiting the organizations proscribed by the Act to those designated on the list or lists of the Attorney General which had been issued prior to the effective date of the Act. Although this interpretation discarded clear language of the oath as surplusage, the court denied the appellants' petition for rehearing which included a plea that refusal of the court to permit appellants to take the oath as so interpreted was violative of due process.

The purpose of the Act, we are told, "was to make loyalty a qualification to hold public office or be employed by the State." 205 Okl. at page 305. During periods of international stress, the extent of legislation with such objectives accentuates our traditional concern about the relation of government to the individual in a free society. The perennial problem of defining that relationship becomes acute when disloyalty is screened by ideological patterns and techniques of disguise that make it difficult to identify. Democratic government is not powerless to meet this threat, but it must do so without infringing the freedoms that are the ultimate values of all democratic living. In the adoption of such means as it believes effective, the legislature is therefore confronted with the problem of balancing its interest in national security with the often conflicting constitutional rights of the individual.

In a series of cases coming here in recent years, we have had occasion to consider legislation aimed at safeguarding the public service from dis-

loyalty. *Garner v. Board of Public Works*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485; *Gerende v. Board of Supervisors*, 341 U. S. 56. It is in the context of these decisions that we determine the validity of the oath before us.

Garner involved a Los Angeles ordinance requiring all city employees to swear that they did not advocate the overthrow of the government by unlawful means or belong to organizations with such objectives. The ordinance implemented an earlier charter amendment which disqualified from municipal employment all persons unable to take such an oath truthfully. One of the attacks made on the oath in that case was that it violated due process because its negation was not limited to organizations known by the employee to be within the proscribed class. This argument was rejected because we felt justified in assuming that scienter was implicit in each clause of the oath.

Adler also indicated the importance of determining whether a rule of exclusion based on association applies to innocent as well as knowing activity. New York had sought to bar from employment in the public schools persons who advocate, or belong to organizations which advocate, the overthrow of the government by unlawful means. The Feinberg Law directed the New York Board of Regents to make a listing, after notice and hearing, of organizations of the type described. Under § 3022 of the statute, Education Law, McK. Consol. Laws, c. 16, the Regents provided by regulation that membership in a listed organization should be *prima facie* evidence of disqualification for office in the New York public schools. In upholding this legislation, we expressly noted that the New York courts had construed the statute to require knowledge of organizational purpose before the regulation could apply. 342 U. S. at page 494. *Cf. American Communications Ass'n v. Douds*, 339 U. S. 382, 413.

The oath in *Gerende* was required of candidates for public office who sought places on a Maryland ballot. On oral argument in that case, the Maryland Attorney General assured us that he would advise the proper state authorities to accept, as complying with the statute, an affidavit stating that the affiant was not engaged in an attempt to overthrow the government by force or violence or knowingly a member of an organization engaged in such an attempt. Because we read an earlier Maryland Court of Appeals' decision as interpreting the statute so that such an affidavit would satisfy its requirements, we affirmed on the basis of this assurance.

We assumed in *Garner*, that if our interpretation of the oath as containing an implicit scienter requirement was correct, Los Angeles would give the petitioners who had refused to sign the oath an opportunity to take it as interpreted and resume their employment. But here, with our decision in *Garner* before it, the Oklahoma Supreme Court refused to extend to appellants an opportunity to take the oath. In addition, a petition for rehearing which urged that failure to permit appellants to

take the oath as interpreted deprived them of due process was denied. This must be viewed as a holding that knowledge is not a factor under the Oklahoma statute. We are thus brought to the question touched on in *Garner, Adler, and Gerende*: whether the due process clause permits a state in attempting to bar disloyal individuals from its employ to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one.

But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. \* \* \* At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.

There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy." Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler and Gerende* is decisive. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.

But appellee insists that *Adler and United Public Workers v. Mitchell*, 330 U. S. 75, are contra. We are referred to our statement in *Adler* that persons seeking employment in the New York public schools have "no right to work for the State in the school system on their own terms. *United Public Workers v. Mitchell* \* \* \*. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York." 342 U. S. at page 492. To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United Public Workers*, though we held that the Federal Government through the Hatch Act, 18 U. S. C. §§ 118j, 118l [F. C. A. 18 §§ 118j, 118l], could properly bar its employees from certain types of political activity

thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." 330 U. S. at page 100. See also *In re Summers*, 325 U. S. 561, 571. We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Because of this disposition, we do not pass on the serious questions raised as to whether the Act, in proscribing those "communist front or subversive organizations" designated as such on lists of the Attorney General of the United States, gave fair notice to those affected, in view of the fact that those listings have never included a designation of "communist fronts," and have in some cases designated organizations without classifying them. Nor need we consider the significance of the differing standards employed in the preparation of those lists and their limited evidentiary use under the Federal Loyalty Program.

Reversed.

MR. JUSTICE JACKSON, not having heard the argument, took no part in the consideration or decision of this case.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE BLACK, concurring. \* \* \*

History indicates that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few individuals and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people. Test oaths are made still more dangerous

when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost. \* \* \* MR. JUSTICE DOUGLAS concurs in this opinion.

[The concurring opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE DOUGLAS joined, is omitted.]

#### NOTES

1. *United Public Workers v. Mitchell*, 330 U. S. 75, 91 L. ed. 754, 67 Sup. Ct. 556 (1947), cited in the above opinion, rejected by a four-to-three vote a claim of unconstitutionality brought against a provision of the Hatch Act which made it unlawful (with exceptions) for employees in the executive branch of the federal government to take "any active part in political management or in political campaigns." The legislation was upheld as a reasonable regulation of the supposed evils of political activity of federal personnel, designed to promote efficiency in the public service. In answer to the contention that the statute infringed First Amendment freedoms, the court said: "It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act." Justices Jackson and Murphy did not participate and Justices Black, Douglas and Rutledge dissented.

2. *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356 (1867), and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366 (1867), struck down test oaths adopted by Missouri and by Congress at the close of the Civil War. In both cases these test oaths were deemed to be bills of attainder and ex post facto laws within the meaning of the Constitution (Art. I, § 9, cl. 3). Justices Douglas and Black, dissenting in *Garner v. Board of Public Works*, 341 U. S. 716, 95 L. ed. 1317, 71 Sup. Ct. 909 (1951), discussed in the opinion above, thought that the *Cummings* and *Garland* cases should have been relied upon to invalidate the Los Angeles loyalty oath. They viewed the *Garner* decision as creating doubt as to the continued vitality of these cases, and also the decision in *United States v. Lovett*, 328 U. S. 303, 90 L. ed. 1252, 66 Sup. Ct. 1073 (1946), where an act of Congress which provided that after a certain date no salary should be paid to certain designated federal employees was held invalid as a bill of attainder. The cases are discussed in *Norville, Bill of Attainder—A Rediscovered Weapon Against Discriminatory Legislation*, 26 Ore. L. Rev. 78 (1947); *Wormuth, Legislative Disqualifications as Bills of Attainder*, 4 Vand. L. Rev. 603 (1951).

3. Section 9 (h) of the Labor-Management Relations Act of 1947, known as the Taft-Hartley Act, requires, as a condition of a union's utilizing the opportunities afforded by the act, each of its officers to file an affidavit with the

National Labor Relations Board (1) that he is not a member of the Communist Party or affiliated with such party, and (2) that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods. The statute also makes it a criminal offense to make willfully or knowingly any false statement in such an affidavit. Six justices participated in the Supreme Court's decision affirming a lower federal court's dismissal of a labor union's action for an injunction restraining the enforcement of this provision. Insofar as the statute requires disclosure of membership in the Communist Party, five justices, in an opinion by Chief Justice Vinson, upheld its validity against objections, *inter alia*, that it infringed the rights of free speech, assembly and petition, that it was vague, and that it constituted a bill of attainder. The validity of that portion requiring disavowal of belief or membership in organizations teaching the forceful overthrow of the government was upheld by an equally divided court. Chief Justice Vinson and Justices Reed and Burton construed it as requiring a disavowal of belief in the objective of overthrow by force or other illegal means of the government as it now exists, not merely a prophecy, and said that Congress might well have found that persons having such objective would carry it into their conduct of union affairs. Justice Frankfurter dissented solely on the ground that this portion of the statute was invalid for uncertainty. Justice Jackson, also dissenting as to this portion, thought that it violated the right of free speech. Justice Black dissented on the ground that the entire statute infringed the First Amendment freedoms and penalized beliefs by the imposition of civil disabilities. Justices Douglas, Clark and Minton did not participate. *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 94 L. ed. 925, 70 Sup. Ct. 674 (1950).

4. In *Osman v. Douds*, 339 U. S. 846, 94 L. ed. 1328, 70 Sup. Ct. 901 (1950), where the same issue was presented, the court's per curiam opinion stated: "With regard to that part of the section which is concerned with membership in, or affiliation with, the Communist Party, the court holds the requirement to be constitutional. Mr. Justice Black dissents for reasons stated in his dissent in *American Communications Association v. Douds*, *supra*. With regard to the constitutionality of other relevant parts of the section, the court is equally divided. Mr. Justice Minton joins in the views expressed by the Chief Justice, who was joined by Mr. Justice Reed and Mr. Justice Burton in the cases above cited. Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson adhere to their opinions in those cases. Mr. Justice Douglas joins the dissenting opinions of Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson insofar as they hold unconstitutional the portion of the oath dealing with beliefs, and being of the view that provisions of the oath are not separable votes to reverse. He therefore does not find it necessary to reach the question of the constitutionality of the other part of the oath. The judgment of the District Court is therefore affirmed. Mr. Justice Clark took no part in the consideration or decision of this case."

5. A civil servant in the employ of the federal government has no constitutional right to his position and hence can be dismissed without a hearing, pursuant to the Employee Loyalty Program of 1947 upon an ex parte finding that reasonable grounds exist for belief that he is disloyal. *Bailey v. Richardson*, 86 App. D. C. 248, 182 F. (2d) 46 (1950). This judgment was affirmed by an equally divided Supreme Court, Mr. Justice Clark not participating, 341 U. S. 918, 95 L. ed. 1352, 71 Sup. Ct. 669 (1951). In the decision of the Court of Appeals for the District of Columbia it was held (Edgerton, J., dissenting) that a government employee (1) derives no protection from the guaranty of the Sixth Amendment of the right of confrontation by witnesses who have informed against him; (2) need not be afforded any notice and hearing of the quasi-judicial type

before being dismissed, since the due process clause of the Fifth Amendment does not apply to the holding of a government position; (3) derives no protection from the First Amendment, since its guaranties have never been held to prevent the dismissal of government employees because of their political beliefs, activities or affiliations. The court said (citing *United Public Workers v. Mitchell*, supra) that Congress and the President, in the interest of efficiency, may impinge upon otherwise inviolate rights of government employees to free participation in political speech and assembly. "It is our clear opinion that the President, absent congressional restriction, may remove from government service any person of whose loyalty he is not completely convinced. He may do so without assigning any reason and without giving the employee any explanatory notice." For discussions and evaluations of the federal government's employee loyalty program, see *O'Brien, Loyalty Tests and Guilt by Association*, 61 *Harv. L. Rev.* 592 (1948); *Emerson and Helfeld, Loyalty Among Government Employees*, 58 *Yale L. J.* 1 (1948), and a reply by *J. Edgar Hoover*, 58 *Yale L. J.* 401 (1949); *Durr, The Loyalty Order's Challenge to the Constitution*, 16 *U. of Chi. L. Rev.* 298 (1949); *Kaplan, Loyalty Review of Federal Employees*, 23 *N. Y. U. L. Q. Rev.* 437 (1948); *Richardson, The Federal Employee Loyalty Program*, 51 *Col. L. Rev.* 546 (1951). See also, *Horowitz, Report on the Los Angeles City and County Loyalty Programs*, 5 *Stanf. L. Rev.* 233 (1953).

6. On the same day that *Bailey v. Richardson* was decided, the court held that the determination by the Attorney General of the United States, made without a hearing and under the alleged authority of a presidential executive order, that certain organizations were to be included on a list of groups designated by him as "communist," which listing was to be used in the investigation of the loyalty of government employees, constituted a legal injury to such organizations, which were entitled to a hearing on the issue as to whether the designation was correct. Five justices upheld the complaining organizations, but for such a diversity of reasons that there was no "opinion of the court." Justice Clark did not participate. A dissent was written by Justice Reed, with Chief Justice Vinson and Justice Minton joining. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 95 L. ed. 817, 71 Sup. Ct. 624 (1951). The decision is discussed in *McCarran, The Supreme Court and the Loyalty Program: The Effect of Refugee Committee v. McGrath*, 37 *Am. Bar Assn. J.* 434 (1951).

## DENNIS v. UNITED STATES.

Supreme Court of the United States, 1951.  
341 U. S. 494, 95 L. ed. 1137, 71 Sup. Ct. 857.

MR. CHIEF JUSTICE VINSON announced the judgment of the Court and an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON join.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) § 11, during the period of April, 1945, to July, 1948. The pretrial motion to quash the indictment on the grounds, inter alia, that the statute was unconstitutional was denied, *United States v. Foster*, 80 F. Supp. 479, and the case was set for trial on January 17, 1949. A verdict of guilty as to all the petitioners was returned by the jury on October 14, 1949. The Court of Appeals affirmed the convictions. 183 F. 2d 201. We granted certiorari, 340 U. S. 863, limited to the following two

questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 ed.) §§ 10, 11 (see present 18 U. S. C. § 2385 [F. C. A. 18 § 2385]), provide as follows:

"Sec. 2.

"(a) It shall be unlawful for any person—

"(1) to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

"(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

"Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of \* \* \* this title."

The indictment charged the petitioners with wilfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages.

Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us, and we must base any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail. \* \* \*

It will be helpful in clarifying the issues to treat next the contention that the trial judge improperly interpreted the statute by charging that the statute required an unlawful intent before the jury could convict. More specifically, he charged that the jury could not find the petitioners guilty under the indictment unless they found that petitioners had the intent "to overthrow the government by force and violence as speedily as circumstances permit."

Section 2(a)(1) make it unlawful "to knowingly or wilfully advocate, \* \* \* or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence \* \* \*." Section 2(a)(3) "to organize or help to organize any society, group, or assembly of persons who teach, advocate or encourage the overthrow \* \* \*." Because of the fact that § 2(a)(2) expressly requires a specific intent to overthrow the Government, and because of the absence of precise language in the foregoing subsections, it is claimed that Congress deliberately omitted any such requirement. We do not agree. It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive "knowingly or wilfully" in § 2(a)(1), or the omission of exact language in § 2(a)(3). The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. \* \* \*

The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle,

carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that by its terms it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution. *American Communications Ass'n v. Douds*, 339 U. S. 382, 407. We are not here confronted with cases similar to *Thornhill v. Alabama*, 310 U. S. 88; *Herndon v. Lowry*, 301 U. S. 242; and *De Jonge v. Oregon*, 299 U. S. 353, where a state court had given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate the judgments of conviction.

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful "to conduct in an American college and university a course explaining the philosophical theories set forth in the books which have been placed in evidence." Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech.

We pointed out in *Douglas, supra*, that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

No important case involving free speech was decided by this Court prior to *Schenck v. United States*, 249 U. S. 47. Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right. It was not until the classic dictum of Justice Holmes in the *Schenck* case that speech per se received that emphasis in a majority opinion. That case involved a conviction under the Criminal Espionage Act, 40 Stat. 217. The question the Court faced was whether the evidence was sufficient to sustain the conviction. Writing for a unanimous Court, Justice Holmes stated that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U. S. at page 52. But the force of even this expression is considerably weakened by the reference at the end of the opinion to *Goldman v. United States*, 245 U. S. 474, a prosecution under the same statute. Said Justice Holmes, "Indeed [*Goldman*] might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words." 249 U. S. at page 52. The fact is inescapable, too, that the phrase bore no connotation that the danger was to be any threat to the safety of the Republic. The charge was causing and attempting to cause insubordination in the military forces and obstruct recruiting. The objectionable document denounced conscription and its most inciting sentence was, "You must do your share to maintain, support and uphold the rights of the people of this country." 249 U. S. at page 51. Fifteen thousand copies were printed and some circulated. This insubstantial gesture toward insubordination in 1917 during war was held to be a clear and present danger of bringing about the evil of military insubordination.

In several later cases involving convictions under the Criminal Espionage Act, the nub of the evidence the Court held sufficient to meet the "clear and present danger" test enunciated in *Schenck* was as follows: *Frohwerk v. United States*, 249 U. S. 204—publication of twelve newspaper articles attacking the war; *Debs v. United States*, 249 U. S.

211—one speech attacking United States' participation in the war; *Abrams v. United States*, 250 U. S. 616—circulation of copies of two different socialist circulars attacking the war; *Schaefer v. United States*, 251 U. S. 466—publication of a German-language newspaper with allegedly false articles, critical of capitalism and the war; *Pierce v. United States*, 252 U. S. 239—circulation of copies of a four-page pamphlet written by a clergyman, attacking the purposes of the war and United States' participation therein. Justice Holmes wrote the opinions for a unanimous Court in *Schenck*, *Frohwerk* and *Debs*. He and Justice Brandeis dissented in *Abrams*, *Schaefer* and *Pierce*. The basis of these dissents was that, because of the protection which the First Amendment gives to speech, the evidence in each case was insufficient to show that the defendants had created the requisite danger under *Schenck*. But these dissents did not mark a change of principle. The dissenters doubted only the probable effectiveness of the puny efforts toward subversion. \* \* \*

The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, *e. g.*, interference with enlistment. The dissents, we repeat, in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence.

The next important case before the Court in which free speech was the crux of the conflict was *Gitlow v. New York*, 268 U. S. 652.  
\* \* \*

Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.  
\* \* \*

In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. In this category we may put such cases as *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Martin v. Struthers*, 319 U. S. 141; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624; *Thomas v. Collins*, 323 U. S. 516; *Marsh v. Alabama*, 326 U. S. 501; but *cf.* *Prince v. Massachusetts*, 321 U. S. 158; *Cox v. New Hampshire*, 312 U. S. 569. Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack,

it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in *Gitlow* was a comparatively isolated event bearing little relation in their minds to any substantial threat to the safety of the community. Such also is true of cases like *Fiske v. Kansas*, 274 U. S. 380, and *De Jonge v. Oregon*, 299 U. S. 353; but *cf. Lazar v. Pennsylvania*, 286 U. S. 532. They were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. *Cf. Pinkerton v. United States*, 328 U. S. 640; *Goldman v. United States*, 245 U. S. 474; *United States v. Rabinowich*, 238 U. S. 78. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

Although we have concluded that the finding that there was a sufficient danger to warrant the application of the statute was justified on the merits, there remains the problem of whether the trial judge's treatment of the issue was correct. He charged the jury, in relevant part, as follows:

"In further construction and interpretation of the statute I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

\* \* \*

"If you are satisfied that the evidence establishes beyond a reasonable doubt that the defendants, or any of them, are guilty of a violation of the statute, as I have interpreted it to you, I find as a matter of law

that there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution.

"This is matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support my ruling that the case should be submitted to you to pass upon the guilt or innocence of the defendants. \* \* \*

It is thus clear that he reserved the question of the existence of the danger for his own determination, and the question becomes whether the issue is of such a nature that it should have been submitted to the jury.

The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of §§ 2(a)(1) and 2(a)(3) of the Smith Act, involved in the conspiracy charge. There can be no doubt that if the jury found those facts against the petitioners violation of the Act would be established. The argument that the action of the trial court is erroneous, in declaring as a matter of law that such violation shows sufficient danger to justify the punishment despite the First Amendment, rests on the theory that a jury must decide a question of the application of the First Amendment. We do not agree.

When facts are found that establish the violation of a statute the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case. \* \* \*

The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a "clear and present danger" of the substantive evil which the legislature had the right to prevent. Bearing as it does, the marks of a "question of law," the issue is properly one for the judge to decide.

There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. \* \* \*

We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. But petitioners themselves contend that the verbaliza-

tion, "clear and present danger" is the proper standard. We see no difference from the standpoint of vagueness, whether the standard of "clear and present danger" is one contained in *haec verba* within the statute, or whether it is the judicial measure of constitutional applicability. We have shown the indeterminate standard the phrase necessarily connotes. We do not think we have rendered that standard any more indefinite by our attempt to sum up the factors which are included within its scope. We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line, which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. \* \* \*

We hold that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act, do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are affirmed. Affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

[MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, concurring in the affirmance of the judgment, wrote separate opinions which are too lengthy for inclusion here.]

MR. JUSTICE DOUGLAS, dissenting.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful. Petitioners, however, were not charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and

advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence. It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: Foundations of Leninism by Stalin (1924), The Communist Manifesto by Marx and Engels (1848), State and Revolution by Lenin (1917), History of the Communist Party of the Soviet Union (1939).

Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the government is. The Act, as construed, requires the element of intent—that those who teach the creed believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.

There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here. Treason was defined to require overt acts—the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but *for what they thought*; they get convicted not for what they said but for the purpose with which they said it.

Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with

ordinary acts but with speech, to which the Constitution has given a special sanction. \* \* \*

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 376-377. \* \* \*

I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. \* \* \*

Yet, whether the question is one for the Court or the jury, there should be evidence of record on the issue. This record, however, contains no evidence whatsoever showing that the acts charged, *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary. \* \* \*

That ruling is in my view not responsive to the issue in the case. We might as well say that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace.

The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that there is no evidence in the record.

If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that *as a political party* they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state which the Communists could carry. Communism in the world scene is no bogey-man; but Communists as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have in fact infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places—these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the F. B. I.; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is

the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.

This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims. \* \* \*

Vishinsky wrote in 1948 in *The Law of the Soviet State*, "In our state, naturally there can be no place for freedom of speech, press, and so on for the foes of socialism."

Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

[An appendix by MR. JUSTICE DOUGLAS citing First Amendment cases raising the issue of clear and present danger since that test was first formulated is omitted here.]

MR. JUSTICE BLACK, dissenting.

Here again, as in *Breard v. Alexandria*, 341 U. S. 622, my basic disagreement with the Court is not as to how we should explain or reconcile what was said in prior decisions but springs from a fundamental difference in constitutional approach. Consequently, it would serve no useful purpose to state my position at length.

At the outset I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm these

convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that Congress "shall make no law \* \* \* abridging the freedom of speech, or of the press \* \* \*." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthestmost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Bridges v. California*, 314 U. S. 252, 263.

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection. \* \* \*

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

#### NOTE

1. Supreme Court decisions dealing with the rights of free speech and press are collected in the annotations in 93 L. ed. 1151 (1950); 94 L. ed. 973 (1950); 95 L. ed. 1196 (1951); 96 L. ed. 1126 (1952), and 97 L. ed. 955 (1953).

For recent discussions, from various viewpoints, of some of the problems raised by the cases in this section, including the present status of the "clear and present danger" test, see Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 *Corn. L. Q.* 182, 352 (1948, 1949); Nathanson, *The Communist Trial and the Clear and Present Danger Test*, 63 *Harv. L. Rev.* 1167 (1950); Richardson, *Freedom of Expression and the Function of Courts*, 65 *Harv. L. Rev.* 1 (1951); Freund, *The Supreme Court and Civil Liberties*, 4 *Vand. L. Rev.* 533 (1951); Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 *Vand. L. Rev.* 620 (1951); Antieau, *The Rule of Clear and Present Danger: Scope of its Applicability*, 48 *Mich. L. Rev.* 811 (1950); "Clear and Present Danger"—Its Meaning and Significance, 25 *Notre Dame Lawyer* 603 (1950); Gorfinkel and Mack, *Dennis v. United States and the*

Clear and Present Danger Rule, 39 Cal. L. Rev. 475 (1951); Corwin, Bowing Out "Clear and Present Danger," 27 Notre Dame Lawyer 325 (1952); Boudin, "Seditious Doctrines" and the "Clear and Present Danger" Rule, 38 Va. L. Rev. 143, 315 (1952); Antieau, *Dennis v. United States*, 5 Vand. L. Rev. 141 (1952); Swisher, The Supreme Court in a Changing Role, 20 U. of Kansas City L. Rev. 1 (1952); Curtis, A Modern Supreme Court in a Modern World, 4 Vand. L. Rev. 427 (1951). For a discussion of the *Dennis* case in the Court of Appeals, see Note, Clear and Present Danger Re-examined, 51 Col. L. Rev. 98 (1951). The viewpoint of Mr. Justice Jackson is set forth briefly in his article, Wartime Security and Liberty Under Law, 1 Buffalo L. Rev. 103 (1951). The view that the Supreme Court has played an ineffective part in recent years in the maintenance of democratic processes and the preservation of civil liberties is carefully documented in Frank, Court and Constitution: The Passive Period, 4 Vand. L. Rev. 400 (1951).

### Section 5.—The Guaranty of Religious Liberty.

#### CANTWELL v. CONNECTICUT.

Supreme Court of the United States, 1940.

310 U. S. 296, 84 L. ed. 1213, 60 Sup. Ct. 900, 128 A. L. R. 1352.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County each of them was convicted on the third count, which charged a violation of § 6294 of the General Statutes of Connecticut, and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court the conviction of all three on the third count was affirmed. The conviction of Jesse Cantwell, on the fifth count, was also affirmed, but the conviction of Newton and Russell on that count was reversed and a new trial ordered as to them.

By demurrers to the information, by requests for rulings of law at the trial, and by their assignments of error in the state Supreme Court, the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner they made the point that they could not be found guilty on the fifth count, without violation of the Amendment. \* \* \*

The facts adduced to sustain the conviction on the third count follow. On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets

on religious subjects, a portable phonograph and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted he asked the person to buy the book described and, upon refusal, he solicited such contribution towards the publication or the pamphlets as the listener was willing to make. If a contribution was received a pamphlet was delivered upon condition that it would be read.

Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled "Enemies," included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah's Witnesses.

The statute under which the appellants were charged provides:

"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute but consisted only of distribution of books, pamphlets, and periodicals. The State Supreme Court construed the finding of the trial court to be that "in addition to the sale of the books and the distribution of the pamphlets the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute." It overruled the contention that the Act, as applied to the appellants, offends the due process clause of the Fourteenth Amendment, because it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes.

The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played

the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

The court held that the charge was not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to breach of the peace, and that the facts supported the conviction of that offense.

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior

restraint on the exercise of their religion within the meaning of the Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that "it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not been performed." It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint

which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Second. We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner's conduct constituted the commission of an of-

fense under the state law, and we accept its decision as binding upon us to that extent.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principal of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question "Did you do anything else or have any other reaction?" "No, sir, because he said he would take the victrola and he went." The other witness testified that he told Cantwell he had better get off the street before something happened to him and that was the end of the matter as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount

to a breach of the peace. One may, however, be guilty of the offense if he commits acts or makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the State appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

The judgment affirming the convictions on the third and fifth counts is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

## NOTES

1. In *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244 (1878) the defendant, who had been convicted in a district court for the Territory of Utah of the crime of bigamy in violation of a federal statute defining and affixing a punishment for this offense, contended that his bigamous marriage was contracted as a matter of religious belief or duty; that he was a member of the Mormon Church and a believer in its doctrines, one of which was that it was the duty of male members of the Church to practice polygamy. In affirming his conviction the court, through Chief Justice Waite, said that under the First Amendment "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." In further justification of its conclusion that the statute was within the legislative power of Congress, the opinion said: "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. \* \* \* Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

2. *Hamilton v. Regents of the University of California*, 293 U. S. 245, 79 L. ed. 343, 55 Sup. Ct. 197 (1934) sustained a regulation made by the Regents of the University of California which required "all able-bodied students" in the University under the age of twenty-four, being citizens of the United States and below the academic rank of junior, to complete a course in military training, over appellants' conscientious objection that military training was repugnant to the tenets and discipline of their religion. This case is generally cited as bringing the religious liberty guaranty of the First Amendment on a level with freedom of speech and press as one of the fundamental civil liberties which the due process clause of the Fourteenth Amendment forbids the states to abridge, although the court's opinion is not conclusive on the point. Mr. Justice Butler, speaking for the court, said: "There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training." Cases cited in support of this statement were *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Stromberg v. California* and *Near v. Minnesota*. Mr. Justice Cardozo, concurring separately and joined by Justices Brandeis and Stone, was more specific: "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states." It was not until 1940, however, when *Cantwell v. Connecticut* was decided, that there was a direct and unequivocal holding on the point. For several years thereafter, mainly as a result of the widespread activities of Jehovah's Witnesses, who fought every community attempt to restrict their freedom of action with zeal and determination, many important cases involving religious liberty issues were decided by the Supreme Court.

3. The widespread attempt of municipalities to collect from Jehovah's Witnesses the usual license taxes or fees imposed on peddlers, sellers and canvassers presented a constitutional issue which the Supreme Court found difficult to resolve. Could such taxes, even though nondiscriminatory, be validly collected on the sale of religious literature by canvassers for the Witnesses? The cumulative burden on the sect was considerable, since their ministers and salesmen traveled from town to town. In *Jones v. Opelika*, 316 U. S. 584, 86 L. ed. 1691, 62 Sup. Ct. 1231, 141 A. L. R. 514 (1942), the Court held, by a five-to-four vote,

that since the municipal ordinance of an Alabama city exacting a license fee from religious adherents engaged in the sale of religious books and pamphlets was reasonable and nondiscriminatory, no infringement of the guaranty of freedom of religion resulted. A year later, however, in *Murdock v. Pennsylvania*, 319 U. S. 105, 87 L. ed. 1292, 63 Sup. Ct. 870, 146 A. L. R. 81 (1943), in another five-to-four decision, the court vacated this judgment and held invalid a similar exaction by a Pennsylvania city on the ground that it was a condition imposed on the exercise of a constitutional freedom. The new majority declared that the efforts of the Witnesses to vend their literature constituted a religious rather than a commercial venture. "Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." In *Follett v. McCormick*, 321 U. S. 573, 88 L. ed. 938, 64 Sup. Ct. 717, 152 A. L. R. 317 (1944) a similar ordinance of a South Carolina town was held invalid as applied to a member of the Jehovah's Witnesses who was a resident of the town, going from house to house distributing books and obtaining his living from the money received.

In *Jamison v. Texas*, 318 U. S. 413, 87 L. ed. 869, 63 Sup. Ct. 669 (1943) a Dallas city ordinance was invalidated which forbade the distribution of handbills in the streets, as applied in convicting a Jehovah's Witness for distributing copies of a handbill which invited people to attend a meeting of this sect in a park and which also solicited the purchase of religious books. *Largent v. Texas*, 318 U. S. 418, 87 L. ed. 873, 63 Sup. Ct. 667 (1943) likewise found constitutionally objectionable a city ordinance forbidding any person to solicit orders or to sell books within the residence portion of a city without first obtaining a permit, which was to be issued only if after investigation the mayor deemed it proper or advisable, as applied to the distribution of religious literature by a Jehovah's Witness, who offered books for sale without applying for a permit.

4. In *Martin v. Struthers*, 319 U. S. 141, 87 L. ed. 1313, 63 Sup. Ct. 862 (1943) an ordinance which without qualification made it unlawful for any person distributing handbills, circulars or other advertisements to ring the doorbell or otherwise summon the inmates of any residence to the door for the purpose of receiving such literature, was held invalid as applied to a Jehovah's Witness, in a five-to-four decision. The holding was qualified by the assumption that a statute would be valid "which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed."

5. *Marsh v. Alabama*, 326 U. S. 501, 90 L. ed. 265, 66 Sup. Ct. 276 (1946) held that the constitutional guaranties of freedom of the press and of religion prevented a state from imposing criminal punishment on a member of Jehovah's Witnesses for distributing religious literature on the premises of a company-owned town, contrary to the wishes of the town's management. The court said: "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." Justice Reed, in a dissent concurred in by Chief Justice Stone and Justice Burton, said: "The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech." The same result was reached in *Tucker v. Texas*, 326 U. S. 517, 90 L. ed. 274, 66 Sup. Ct. 274 (1946), where the village was owned by the United States under a congressional program which was designed to provide housing for persons engaged in national defense activities.

6. *Prince v. Massachusetts*, 321 U. S. 158, 88 L. ed. 645, 64 Sup. Ct. 438 (1944) upheld the conviction of an adult Jehovah's Witness for violating a statute prohibiting children under specified ages from selling or exercising any trade in any street or public place by permitting her nine year old niece, over whom she had custody, to accompany her while soliciting sales of religious books and periodicals. The court said: "We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case." Justice Murphy dissented. Justice Jackson, joined by Justices Roberts and Frankfurter, concurred in the result but dissented from the grounds of affirmance.

7. Defendant, a member of Jehovah's Witnesses, conducted religious services in a public park without the license required by a city ordinance, after his application for such license had been denied by the city council. His conviction of violating the ordinance was affirmed by the Supreme Court of New Hampshire, which held that the defendant's remedy for any arbitrary conduct of the city council was in appropriate judicial proceedings, and that a wrongful refusal of a license was not a bar to the prosecution for violation of the ordinance. In affirming this conviction the Supreme Court of the United States relied on the fact that the state court, by its construction of the ordinance, left to the licensing officials no discretion as to granting permits, no power to discriminate, no control over speech. Consequently the council's refusal of the license was wrongful. Viewing the license requirement as a reasonable and nondiscriminatory regulation for the preservation of peace and good order, the court said that it could not say that a state's requirement that redress must be sought through appropriate judicial procedure violates due process. "It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties is exasperating and costly. \* \* \* Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning." Justices Black and Douglas dissented. *Poulos v. New Hampshire*, 345 U. S. 395, 97 L. ed. 1105, 73 Sup. Ct. 760, 30 A. L. R. (2d) 987 (1953).

8. In *Kunz v. New York*, 340 U. S. 290, 95 L. ed. 280, 71 Sup. Ct. 312 (1951) the refusal of a permit to a Baptist minister to conduct a religious meeting on New York City streets because the minister in the past had ridiculed and denounced other religious beliefs, thereby stirring strife and threatening violence, was held to be a denial of freedom of speech because of the lack of appropriate standards in the ordinance to guide the police commissioner in issuing permits. In *Niemotko v. Maryland*, 340 U. S. 268, 95 L. ed. 267, 71 Sup. Ct. 325 (1951) a conviction of members of a Jehovah's Witnesses group for conducting a religious meeting in a public park without a permit was reversed where the power of the municipal authorities to issue such permits was derived, not from a statute or an ordinance, but from local practice not defining any standards or limitations. Justice Frankfurter's concurring opinion contains a helpful review and analysis of previous decisions involving restrictions on the exercise of the right of free speech in public places.

9. For discussions of the cases, see Waite, *The Debt of Constitutional Law to Jehovah's Witnesses*, 28 Minn. L. Rev. 209 (1944); Howerton, *Jehovah's Witnesses and the Federal Constitution*, 17 Miss. L. J. 347 (1946); Barber, *Religious Liberty v. Police Power: Jehovah's Witnesses*, 41 Am. Pol. Sci. Rev. 226 (1947).

WEST VIRGINIA STATE BOARD OF  
EDUCATION v. BARNETTE.

Supreme Court of the United States, 1943.

319 U. S. 624, 87 L. ed. 1628, 63 Sup. Ct. 1178, 147 A. L. R. 674.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis*, 310 U. S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering, and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools."

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become a "regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement

of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, Verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present Chief Justice said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." 310 U. S. at page 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not

merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton v. Regents of the University of California*, 293 U. S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of state often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. \* \* \*

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While re-

ligion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The Gobitis decision, however, *assumed*, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the Gobitis decision.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'" and that the answer must be in favor of strength. *Minersville School District v. Gobitis*, supra, 310 U. S. at page 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political

neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in states, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.*, at 598.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free." \* \* \*

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an

instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the state it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence, in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.*, 310 U. S. at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Consti-

tution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the state or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in poli-

tics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Affirmed.

[MR. JUSTICE ROBERTS and MR. JUSTICE REED noted their dissent, expressing adherence to the views set forth in the *Gobitis* case. MR. JUSTICE FRANKFURTER, who spoke for the Court in the *Gobitis* case, wrote a dissenting opinion which is an eloquent exposition of his constitutional philosophy but which is too lengthy for inclusion here and is not susceptible of fair condensation. Brief concurring opinions were also written by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, and by MR. JUSTICE MURPHY.]

#### NOTES

1. Mr. Justice Stone, who was the sole dissenter in *Minersville School District v. Gobitis*, vigorously attacked the decision on the ground that it authorized the state to coerce belief or the expression of it where that expression violates the religious convictions of the individual. "History teaches us," he said, "that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." The *Gobitis* case provoked much critical comment which caused some of the members of the court who participated in it to question its soundness. In the previously noted decision in *Jones v. Opelika*, 316 U. S. 584, 86 L. ed. 1691, 62 Sup. Ct. 1231, 141 A. L. R. 514 (1942), Justices Black, Douglas and Murphy, who dissented therein, appended a statement which said, in part: "Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided." With Mr. Justice Stone this made four members of the court who no longer supported the rationale of that case. When Mr. Justice Rutledge replaced Mr. Justice Byrnes on the court in the winter of 1943, the stage was set for a reversal of the earlier precedent. Mr. Justice Jackson, who had not been on the bench when the first case was decided, joined the new majority. Another interesting sidelight on the second flag-salute case is the fact that a three-judge federal district court, refusing to follow the *Gobitis* decision, restrained enforcement against complainants of the West Virginia statute and regulation of the Board of Education. See the opinion of Parker, J., in the same case below, 47 F. Supp. 251 (1942).

2. In *Taylor v. Mississippi*, 319 U. S. 583, 87 L. ed. 1600, 63 Sup. Ct. 1200 (1943) a state statute making it a criminal offense to indoctrinate any creed, theory or set of principles which tended to create an attitude of refusal to salute

the flag of the United States or of the state, was held unconstitutional as a denial of liberty guaranteed by the Fourteenth Amendment.

### EVERSON v. BOARD OF EDUCATION.

Supreme Court of the United States, 1947.

330 U. S. 1, 91 L. ed. 711, 67 Sup. Ct. 504, 168 A. L. R. 1392.

MR. JUSTICE BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship in the Catholic faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the State constitution. 132 N. J. L. 98, 39 A. 2d 75. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. 133 N. J. L. 350, 44 A. 2d 333. The case is here on appeal under 28 U. S. C. § 344(a) [F. C. A. 28 § 344(a)].

Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying state payment for their transportation, we need not consider this exclusionary language; it has no relevancy to any constitutional question here presented. Furthermore, if the exclusion clause had been properly challenged, we do not know whether New Jersey's highest court would construe its statutes as precluding payment of the school transportation of any group of pupils, even those of a private school run for profit. Consequently, we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.

The only contention here is that the State statute and the resolution, insofar as they authorized reimbursement to parents of children at-

tending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the State law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church, or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green v. Frazier*, 253 U. S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. \* \* \*

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Board of Education*, 281 U. S. 370; *Interstate Consolidated Street Ry. Co. v. Massachusetts*, 207 U. S. 79, 87. \* \* \* The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than

run the risk of traffic and other hazards incident to walking or "hitch-hiking." \* \* \* Nor does it follow that a law has a private rather than public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 518. Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history. \* \* \*

Second. The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania*, 319 U. S. 105, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting the "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established

churches, non-attendance at those churches, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established

religions. Madison's Remonstrance received strong support throughout Virginia. And the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. \* \* \*

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. \* \* \* Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. \* \* \*

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a

person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." \* \* \*

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. \* \* \* New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to its citizens without regard to their religious belief.

Measured by these standards we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions in-

tended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

MR. JUSTICE JACKSON, dissenting.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly

comes to mind as the most fitting precedent is that of Julia, who, according to Byron's reports, "whispering 'I will Ne'er consent,'—consented." \* \* \*

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church?" But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this act if applied to police and fire service. Could we sustain an act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid. \* \* \*

There is no answer to the proposition more fully expounded by MR. JUSTICE RUTLEDGE that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision. \* \* \*

I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of MR. JUSTICE

RUTLEDGE in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

MR. JUSTICE FRANKFURTER joins in this opinion.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON agree, dissenting.

\* \* \* [Only excerpts from this lengthy dissent are included here.]

This case forces us to determine squarely for the first time what was "an establishment of religion" in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command. \* \* \*

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity." Madison could not have confused "church" and "religion" or "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question. \* \* \*

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content. \* \* \*

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly, supply it.

By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled. Indeed the matter had become so well understood as to have been taken for granted in all but formal phrasing. Hence, the only enlightening reference shows concern, not to preserve any power to use public funds in aid of religion, but to prevent the Amendment from outlawing private gifts inadvertently by virtue of the breadth of its wording. \* \* \*

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. Today as then the furnishing of "contributions of money for the propagation of opinions which he disbelieves" is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." Remonstrance, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to "the propagation of opinions which he disbelieves" in so far as their religions differ, as do others who accept no creed without regard to those differences. \* \* \*

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or

their parents for them desire a different kind of training others do not demand.

But if these feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law. \* \* \*

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. \* \* \* In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

#### NOTE

1. *Cochran v. Louisiana State Board of Education*, 281 U. S. 370, 74 L. ed. 913, 50 Sup. Ct. 335 (1930) found no valid objection under the Fourteenth Amendment to a state law providing free textbooks to school children, some of whom attended private and parochial schools, since the general welfare is deemed to be promoted through education.

#### ZORACH v. CLAUSON.

Supreme Court of the United States, 1952.  
343 U. S. 306, 96 L. ed. 954, 72 Sup. Ct. 679.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of chil-

dren who have been released from public school but who have not reported for religious instruction.

This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike *McCullum v. Board of Education*, 333 U. S. 203, which involved a "released time" program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting its free exercise.

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the *McCullum* case. Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the co-operation of the schools this "released time" program, like the one in the *McCullum* case, would be futile and ineffective. The New York Court of Appeals sustained the law against this claim of unconstitutionality. 303 N. Y. 161, 100 N. E. 2d 463. The case is here on appeal. 28 U. S. C. § 1257(2) [F. C. A. 28 § 1257(2)].

The briefs and arguments are replete with data bearing on the merits of this type of "released time" program. Views pro and con are expressed, based on practical experience with these programs and with their implications. We do not stop to summarize these materials nor to burden the opinion with an analysis of them. For they involve considerations not germane to the narrow constitutional issue presented. They largely concern the wisdom of the system, its efficiency from an educational point of view, and the political considerations which have motivated its adoption or rejection in some communities. Those matters are of no concern here, since our problem reduces itself to whether New York by this system has either prohibited the "free exercise" of religion or has made a law "respecting an establishment of religion" within the meaning of the First Amendment.

It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the "free exercise" of religion and "an establishment of religion" within the meaning of the First Amendment.

Moreover, apart from that claim of coercion, we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See *Everson v. Board of Education*, 330 U. S. 1; *McCullum v. Board of Education*, *supra*. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass.

A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on a theory, previously advanced, that each case must be decided on the basis of "our own prepossessions." See *McCullum v. Board of Education*, supra, 333 U. S. at page 238. Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree. See *McCullum v. Board of Education*, supra, 333 U. S. at page 231.

In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion. Affirmed.

Mr. JUSTICE BLACK, dissenting.

Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, held invalid as an "establishment of religion" an Illinois system under which school children, compelled by law to go to public schools, were freed from some hours of required school work on condition that they attend special religious classes held in the school buildings. Although the classes were taught by sectarian teachers neither employed nor paid by the state, the state did use its power to further the program by releasing some of the children from regular class work, insisting that those released attend the religious classes, and requiring that those who remained behind do some kind of academic work while the others received their religious training. \* \* \*

I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention. In the New York program, as in that of Illinois, the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over. As we attempted to make categorically clear, the McCollum decision would have been the same if the religious classes had not been held in the school buildings. We said:

"Here *not only* are the state's tax-supported public school buildings used for dissemination of religious doctrines. The State *also* affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State." (Emphasis supplied.) McCollum v. Board of Education, *supra*, 333 U. S. at page 212. McCollum thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.

I am aware that our McCollum decision on separation of church and state has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate. Our insistence

on "a wall between Church and State which must be kept high and impregnable" has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere. With equal conviction and sincerity, others have thought the McCollum decision fundamentally wrong and have pledged continuous warfare against it. The opinions in the court below and the briefs here reflect these diverse viewpoints. In dissenting today, I mean to do more than give routine approval to our McCollum decision. I mean also to reaffirm my faith in the fundamental philosophy expressed in McCollum and *Everson v. Board of Education*, 330 U. S. 1. That reaffirmance can be brief because of the exhaustive opinions in those recent cases.

Difficulty of decision in the hypothetical situations mentioned by the Court, but not now before us, should not confuse the issues in this case. Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendance presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over non-believers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State. \* \* \*

MR. JUSTICE FRANKFURTER, dissenting.

By way of emphasizing my agreement with Mr. JUSTICE JACKSON's dissent, I add a few words.

The Court tells us that in the maintenance of its public schools, "[The State government] can close its doors or suspend its operations" so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. Of course a State may provide that the classes in its schools shall be dismissed, for any reason, or no reason, on fixed days, or for special occasions. The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law—those who wish sectarian instruction devoting it to that purpose, those who have ethical instruction at home, to that, those who study music, to that—then of course there is no conflict with the Fourteenth Amendment.

The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. The school system is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction in order to keep them within the school. That is the very thing which raises the constitutional issue. It is not met by disregarding it. Failure to discuss this issue does not take it out of the case.

Again, the Court relies upon the absence from the record of evidence of coercion in the operation of the system. "If in fact coercion were used," according to the Court, "if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented." Thus, "coercion" in the abstract is acknowledged to be fatal. But the Court disregards the fact that as the case comes to us, there could be no proof of coercion, for the petitioners were not allowed to make proof of it. Petitioners alleged that "The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." This allegation—that coercion was in fact present and is inherent in the system, no matter what disavowals might be made in the operating regulations—was denied by respondents. Thus were drawn issues of fact which cannot be determined, on any conceivable view of judicial notice, by judges out of their own knowledge or experience. Petitioners sought an opportunity to adduce evidence in support of these allegations at an appropriate trial. And though the courts below cited the concurring opinion in *McCullum v. Board of Education*, 333 U. S. 203, 226, to "emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied," they denied that opportunity on the ground that such proof was irrelevant to the issue of constitutionality. See 198 Misc. 631, 641; 303 N. Y. 161, 174-175.

When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established. When such is the case, there are weighty considerations for us to require the State court to make its determination only after a thorough canvass of all the circumstances and not to bar them from consideration. Cf. *Chastleton Corp. v. Sinclair*, 264 U. S. 543; *Hammond v. Schappi Bus Line*, 275 U. S. 164. If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the petitioners' complaint, including the fact of coercion, actual and inherent. See Judge Fuld, dissenting below, 303 N. Y. at page 185. Even on a more latitudinarian view, I cannot see how a finding that coercion was absent, deemed critical by this Court in sus-

taining the practice, can be made here, when petitioners were prevented from making a timely showing of coercion because the courts below thought it irrelevant.

The result in the *McCullum* case, 333 U. S. 203, was based on principles that received unanimous acceptance by this Court, barring only a single vote. I agree with MR. JUSTICE BLACK that those principles are disregarded in reaching the result in this case. Happily they are not disavowed by the Court. From this I draw the hope that in future variations of the problem which are bound to come here, these principles may again be honored in the observance. \* \* \*

MR. JUSTICE JACKSON, dissenting.

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes. \* \* \*

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public school-room. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly. \* \* \*

The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power. The same epithetical jurisprudence used by the Court today to beat down those who oppose pressuring children into some religion can devise as good epithets tomorrow against those who object to pressuring them into a favored religion. And, after all, if we concede to the state power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those "duly constituted." We start down a rough road when we begin to mix compulsory public education with compulsory godliness.

A number of Justices just short of a majority of the majority that promulgates today's passionate dialectics joined in answering them in *Illinois ex rel. McCullum v. Board of Education*, 333 U. S. 203. The distinction attempted between that case and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will

show such difference of overtones and undertones as to make clear that the McCollum case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

#### NOTES

1. The principal case and its predecessor, *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 92 L. ed. 649, 68 Sup. Ct. 461, 2 A. L. R. (2d) 1338 (1948), together with *Everson v. Board of Education*, supra, provoked a flood of contemporary discussion and controversy. For a comprehensive treatment from various points of view, see the symposium, *Religion and the State*, 14 Law and Contemporary Problems 1 (Winter, 1949). See also, Owen, *The McCollum Case*, 22 Temp. L. Q. 159 (1948); Schmidt, *Religious Liberty and the Supreme Court of the United States*, 17 Fordham L. Rev. 173 (1948); Sutherland, *Due Process and Disestablishment*, 62 Harv. L. Rev. 1306 (1949); Waite, *Jefferson's "Wall of Separation": What and Where?* 33 Minn. L. Rev. 494 (1949); Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 Ill. L. Rev. 333 (1950); Pfeffer, *Church and State: Something Less Than Separation*, 19 U. of Chi. L. Rev. 1 (1951); Drinan, *The Novel "Liberty" Created by the McCollum Decision*, 39 Geo. L. J. 216 (1951); Note, 17 Geo. Wash. L. Rev. 516 (1949); Comment, 22 So. Cal. L. Rev. 423 (1949); Comment, 26 So. Cal. L. Rev. 186 (1953). Several recent books dealing with problems of church and state are of interest: Johnson and Yost, *Separation of Church and State in the United States* (1948); Parsons, *The First Freedom* (1948); O'Neill, *Religion and Education Under the Constitution* (1949); and Stokes, *Church and State in the United States* (1950).

2. *Doremus v. Board of Education*, 342 U. S. 429, 96 L. ed. 475, 72 Sup. Ct. 394 (1952) was an action in the state courts of New Jersey for a declaratory judgment to declare invalid a statute which provides for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. The action was brought by a taxpayer and by a parent of a pupil on the ground that the statute violated the religious establishment prohibition of the First Amendment of the federal Constitution. On appeal from a judgment of the Supreme Court of New Jersey sustaining the statute, the Supreme Court of the United States, without reaching the merits of the controversy, held that neither the parent nor the taxpayer had a standing to raise the constitutional question. The parent's action had become moot, since the pupil had graduated from the school before the appeal was taken. The taxpayer's action raised no justiciable controversy, since there was no allegation that the activity in question was supported by any separate tax or paid for from any particular appropriation or that it added any sum whatever to the cost of conducting the school. Justices Douglas, Reed and Burton, dissenting, thought that the case deserved a decision on the merits. Conceding that if it were a suit to enjoin a federal law, it could not be maintained by reason of *Massachusetts v. Mellon*, 262 U. S. 447, 67 L. ed. 1078, 43 Sup. Ct. 597 (1923), they expressed the view that New Jersey could fashion her own rules governing the institution of suits in her courts and thus give these taxpayers the status to sue. The court's opinion distinguished *Everson v. Board of Education*, supra, on the ground that there a measurable appropriation or disbursement of school-district funds had been shown, occasioned solely by the activities complained of.

3. In *Fowler v. Rhode Island*, 345 U. S. 67, 97 L. ed. 828, 73 Sup. Ct. 526 (1953) a minister of Jehovah's Witnesses was convicted in the state courts for

violating a municipal ordinance by addressing an orderly meeting of his congregation in a public park. The state conceded, on oral argument before the Supreme Court, that the ordinance did not prohibit church services in the park; other faiths could conduct their services there without violating the ordinance. Reversing the conviction, the court held that this plainly showed that a religious service of Jehovah's Witnesses was treated differently than a similar service of other sects, thus constituting a state preference of some religious groups over this one, in violation of the establishment clause of the First Amendment. "To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another." Mr. Justice Frankfurter concurred in the opinion except insofar as it derived support from the First Amendment; he thought the decision should have been rested solely on the equal protection clause of the Fourteenth Amendment. Mr. Justice Jackson concurred in the result.

## CHAPTER IX

### CONSTITUTIONAL LIMITATIONS: THE EQUAL PROTECTION OF THE LAWS

#### Section 1.—Classification for Purposes of Legislation.

#### MISSOURI v. LEWIS.

Supreme Court of the United States, 1880.  
101 U. S. 22, 25 L. ed. 989.

[The Constitution of Missouri created the St. Louis Court of Appeals giving it jurisdiction of appeals from the circuit courts of St. Louis and four adjoining counties, its decision being final in all except certain enumerated types of cases. Disbarment proceedings were not excepted. From the circuit courts of the other counties of the state appeals lay to the State Supreme Court. A judgment of disbarment of one Bowman given in the circuit court of St. Louis County was affirmed by the St. Louis Court of Appeals. He petitioned the Supreme Court of the state to issue a mandamus to compel Lewis and the other judges of the St. Louis Court of Appeals to allow an appeal from the affirmance. The state Supreme Court denied the petition and this writ of error was taken.]

MR. JUSTICE BRADLEY delivered the opinion of the Court. \* \* \*

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the Fourteenth Amendment of the Constitution of the United States, because it denies to suitors in the courts of Saint Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the state.

If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. \* \* \*

If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. \* \* \* It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The Amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. \* \* \*

The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto.

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For as before said it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. \* \* \* Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies. \* \* \*

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a dis-

crimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance. \* \* \*

Judgment affirmed.

## NOTES

1. The Fort Smith Traction Company of Fort Smith, Arkansas, complained of a state statute which operated upon it alone, requiring it to defray the cost of paving streets occupied by it. In upholding the statute the Supreme Court said: "The act is in form a general statute, but by reason of provisions making it applicable to street railways operating under indeterminate permits in cities of the first class other than in Miller County, it in fact applied to the plaintiff in error alone. \* \* \* The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state." *Ft. Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387, 71 L. ed. 1112, 47 Sup. Ct. 595 (1927). See also *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474, 43 L. ed. 520, 19 Sup. Ct. 268 (1899) (Maryland abridged the right of trial by jury in the courts of Baltimore but not elsewhere in the state); *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. 350 (1887) (the prosecution was allowed fifteen peremptory challenges in large cities and eight elsewhere in the state); *Cincinnati Street R. Co. v. Snell*, 193 U. S. 30, 48 L. ed. 604, 24 Sup. Ct. 319 (1904) (holding valid a state statute which provided that in a suit to which a corporation having fifty or more shareholders is a party, pending in the county where the corporation has its chief office, the opposing party should have an unqualified right to a change of venue, though no corresponding right was given the corporation); *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. 106 (1905) (different method of making up jury lists in one county than elsewhere in the state).

2. "An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws." *Mr. Justice Brewer*, for the court, in *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 571, 42 L. ed. 853, 18 Sup. Ct. 445 (1898).

3. An Illinois statute requires that the nominating petition of a new political party, in addition to being signed by at least 25,000 qualified voters, contain 200 signatures from each of at least 50 of the 102 counties in the state. The effect of the statutory requirement is that the electorate in 49 of the counties with 87% of the registered voters cannot, but 25,000 of the remaining 13% of registered voters, properly distributed among the 53 remaining counties, can form a new party. In an action brought by appellant to enjoin the enforcement of the law, the court upheld the statute as against the claim that it was so discrimina-

tory in its application as to constitute a violation of the guaranty of the equal protection of the laws. It was said that the state has the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. Justices Douglas, Black and Murphy dissented. *MacDougall v. Green*, 335 U. S. 281, 93 L. ed. 3, 69 Sup. Ct. 1 (1948).

4. The doctrine of the principal case was recently applied in *Salsburg v. Maryland*, 346 U. S. 545, 98 L. ed. 281, 74 Sup. Ct. 280 (1954), where the court upheld as not violative of the equal protection guaranty a Maryland statute providing generally that illegally procured evidence is inadmissible, but excepting prosecutions in specified counties for violation of the state gambling laws.

### RADICE v. NEW YORK.

Supreme Court of the United States, 1924.

264 U. S. 292, 68 L. ed. 690, 44 Sup. Ct. 325.

[Plaintiff in error was convicted in the City Court of Buffalo upon the charge of having violated the provisions of a statute of the State of New York, prohibiting the employment of women in restaurants in cities of the first and second class, between the hours of 10 o'clock at night and 6 o'clock in the morning. Plaintiff contended that because of the express exemptions made in the statute, which are stated in the opinion, the statute violated the equality requirement. The New York Court of Appeals having sustained the conviction this writ of error was taken.]

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

\* \* \*

Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (a) that the act discriminates between cities of the first and second class and other cities and communities; and (b) excludes from its operation women employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as those employed in dining rooms and kitchens of hotels and in lunch rooms or restaurants conducted by employers solely for the benefit of their employees.

The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. *Packard v. Banton*, 264 U. S. 140; *Hayes v. Missouri*, 120 U. S. 68. Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms, renders the statute obnoxious to the Constitution. The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 564); but a case where all in the same class of work, are included in the

restraint. Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious." *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually and palpably unreasonable and arbitrary." *Arkansas Natural Gas Co. v. Railroad Commission*, 261 U. S. 379, 384, and cases cited. Thus classifications have been sustained which are based upon differences between fire insurance and other kinds of insurance, *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 562; between railroads and other corporations, *Tullis v. Lake Erie & Western R. R. Co.*, 175 U. S. 348, 351; between barber shop employment and other kinds of labor, *Petit v. Minnesota*, 177 U. S. 164, 168; between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a state and persons engaged in the business of hiring for labor within the state, *Williams v. Fears*, 179 U. S. 270, 275; between sugar refiners who produce the sugar and those who purchase it, *American Sugar Refining Co. v. Louisiana*, *supra*. More directly applicable are recent decisions of this Court, sustaining hours of labor for women in hotels but omitting women employees of boarding houses, lodging houses, etc., *Miller v. Wilson*, 236 U. S. 373, 382; and limiting the hours of labor of women pharmacists and student nurses in hospitals but excepting graduate nurses. *Bosley v. McLaughlin*, 236 U. S. 385, 394-396. The opinion in the first of these cases was delivered by Mr. Justice Hughes, who, after pointing out that in hotels women employees are for the most part chambermaids and waitresses; that it cannot be said that the conditions of work are the same as those which obtain in the other establishments; and that it is not beyond the power of the legislature to recognize the differences, said (pp. 383-384):

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patson v. Pennsylvania*, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee*

Coke Co. v. Taylor, 234 U. S. 224, 227. Upon this principle which has had abundant illustration in the decisions cited below, it cannot be concluded that the failure to extend the act to other and distinct lines of business, having their own circumstances and conditions, or to domestic service, created an arbitrary discrimination as against the proprietors of hotels."

The judgment below is

Affirmed.

#### NOTES

1. In *Dominion Hotel v. Arizona*, 249 U. S. 265, 63 L. ed. 597, 39 Sup. Ct. 273 (1919) a statute was sustained which prescribed a maximum of eight hours per day for women workers in hotels and restaurants and required further that the eight hours per day must fall within the period of twelve consecutive hours, but this last requirement was not to apply to railroad restaurants or eating houses located upon railroad rights of way and operated by or under contract with any railroad company. Mr. Justice Holmes, for the court, said: "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' *Armour & Co. v. North Dakota*, 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. \* \* \* If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines."

2. In *Goesaert v. Cleary*, 335 U. S. 464, 93 L. ed. 163, 69 Sup. Ct. 198 (1948) a Michigan statute forbidding women from being licensed as bartenders and at the same time making an exception in favor of the wives and daughters of the owners of liquor establishments was held not to violate the equal protection clause. "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." Justices Rutledge, Douglas and Murphy dissented.

#### ATCHISON, TOPEKA & SANTA FE R. CO. v. MATTHEWS.

Supreme Court of the United States, 1899.

174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. 609.

Error to the Supreme Court of the State of Kansas.

MR. JUSTICE BREWER delivered the opinion of the Court.

In 1885 the legislature of Kansas passed the following act: "An act relating to the liability of railroads for damages by fire.

"Section 1. Be it enacted by the legislature of the State of Kansas: That in all actions against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to

establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages, (which proof shall be prima facie evidence of negligence on the part of said railroad): Provided, That in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." (Sess. Laws 1885, c. 155, 258.)

Under it an action was brought in the district court of Cloud County which resulted in a judgment against the railroad company, plaintiff in error, for \$2094 damages and \$225 attorney's fees. This judgment having been affirmed by the Supreme Court of the state, the company brought the case here on error.

All questions of fact are settled by the decision of the state courts, *Hedrick v. Atchison, Topeka &c. Railroad*, 167 U. S. 673, 677, and cases cited in the opinion, and the single matter for our consideration is the constitutionality of this statute. It is contended that it is in conflict with the Fourteenth Amendment to the federal Constitution, and this contention was distinctly ruled upon by the Supreme Court of the state adversely to the railroad company. In support of this contention great reliance is placed upon *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U. S. 150. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in amount \$50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the Supreme Court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive.

But while there is a similarity, yet there are important differences, and differences which in our judgment compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent

the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is "caused by the operating" of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Missouri Pac. Railway v. Humes*, 115 U. S. 512. And yet its purpose is not different. Its monition to the railroads is not, pay your debts without suit or you will, in addition, have to pay attorney's fees; but rather, see to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed. \* \* \*

That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, (and sometimes in spite of such care,) scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. \* \* \* Fire catching in the dry grass often runs for miles, destroying not merely crops but houses and barns. \* \* \*

In 1887 the legislature of the State of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated directly or indirectly from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this Court a valid exercise of the legislative power. *St. Louis & San Francisco Railway v. Mathews*, 165 U. S. 1. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire. \* \* \*

Many cases have been before this Court, involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power, are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the laws which is guaranteed by the Fourteenth Amendment does not forbid classifi-

cation. That has been asserted in the strongest language. *Barbier v. Connolly*, 113 U. S. 27. In that case, after in general terms declaring that the Fourteenth Amendment designed to secure the equal protection of the laws, the Court added (pp. 31 and 32):

"But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. \* \* \*

It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damages which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its livestock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that

of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is

Affirmed.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE BROWN, MR. JUSTICE PECKHAM and MR. JUSTICE McKENNA, dissenting.

\* \* \*

There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the Ellis case was exactly in point, namely, "as no duty is imposed there can be no penalty for non-performance." Instead of prescribing some penalty for the neglect by the railroad company of duties specifically enjoined upon it, the state attempts—and by the decision just rendered is enabled—to take from the company the right which we declared in the Ellis case was secured by the Constitution, namely, the right to "appeal to the courts as other litigants, under like conditions and with like protection." \* \* \*

May the state meet the railroad corporation at the doors of its courts of justice and say to it, "If you enter here for the purpose of defending the suit brought against you it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?" \* \* \* If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice—a principle which I had supposed was as old as Magna Charta.

In my opinion the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general principles of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws.

#### NOTES

1. "The exact point of objection is that the improvement [paving a street] is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to nonresident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the states from

classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. \* \* \* The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the nonresidents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. \* \* \* If the legislature saw fit to give those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution." *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 621-622, 48 L. ed. 1142, 24 Sup. Ct. 784 (1904).

2. "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state. \* \* \* The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." Mr. Justice Harlan, for the court, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 46 L. ed. 679, 22 Sup. Ct. 431 (1902).

3. Numerous cases on the validity of statutory provision for attorneys' fees are collected in 11 A. L. R. 884 (1921). See especially cases holding valid allowance of attorneys' fees to successful plaintiffs only, in suits against insurance companies: *Fidelity Mut. Life Assn. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. 662 (1902); *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. 565 (1903).

### MISSOURI, KANSAS & TEXAS R. CO. v. MAY.

Supreme Court of the United States, 1904.

194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. 638.

Error to the County Court of Bell County, State of Texas.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action to recover a penalty of twenty-five dollars, brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, ch. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States.

It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for dis-

crimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch v. Maryland*, 4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way, we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guarantors of the liberties and welfare of the people in quite as great a degree as the courts.

Judgment affirmed.

[MR. JUSTICE BREWER, concurred in the judgment. MR. JUSTICE BROWN delivered a dissenting opinion. JUSTICES WHITE and MCKENNA also dissented.]

#### NOTE

1. In *Asbury Hospital v. Cass County*, 326 U. S. 207, 90 L. ed. 6, 66 Sup. Ct. 61 (1945) the Supreme Court held that the exception of corporations dealing in farm lands and of farmer cooperatives from a statute requiring corporations within ten years from the date of the act to dispose of land not necessary to conduct their business did not constitute a denial of the equal protection of the laws. The court said, through Chief Justice Stone: "The legislature is free to make classifications in the application of a statute which are relevant to the legislative purpose. The ultimate test of validity is not whether the classes differ but whether the differences between them are pertinent to the subject with respect to which the classification is made. \* \* \* Statutory discrimination between classes

which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any state of facts could be conceived which would support it."

### LINDSLEY v. NATURAL CARBONIC GAS CO.

Supreme Court of the United States, 1911.  
220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. 337.

[In the Circuit Court of the United States plaintiff, a shareholder in the defendant corporation, sought an injunction to restrain the corporation from obeying, and New York officials from enforcing, a New York statute, entitled an act for the protection of natural mineral springs. The statute as interpreted in other cases by the New York Court of Appeals prohibited forced pumping of carbonic acid gas from any well made by boring into rock, for the purpose of selling the gas otherwise than in connection with the mineral water, unless the forced pumping did not draw unreasonably or wastefully upon gas lying beneath the land of others. From a decree dismissing plaintiff's bill this appeal was taken.]

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

[After deciding that the statute did not violate the due process limitation, because its definition or restriction of the interests of any surface owner was justified as reasonable protection to adjoining surface owners having equal rights to draw from a common source of gas, citing *Ohio Oil Co. v. Indiana*, 177 U. S. 190, the opinion continues:]

Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

The rules by which this contention must be tested, as is shown by repeated decisions of this Court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must

carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. \* \* \*

Unfortunately, the allegations of the bill shed but little light upon the classification in question. They do not indicate that pumping from wells not penetrating the rock appreciably affects the common supply therein, or is calculated to result in injury to the rights of others, and neither do they indicate that such pumping as is done for purposes other than collecting and vending the gas apart from the waters is excessive or wasteful, or otherwise operates to impair the rights of others. In other words, for aught that appears in the bill, the classification may rest upon some substantial difference between pumping from wells penetrating the rock and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes, and this difference may afford a reasonable basis for the classification. \* \* \*

From statements made in the briefs of counsel and in oral argument, we infer that wells not penetrating the rock reach such waters only as escape naturally therefrom through breaks or fissures; and if this be so, it well may be doubted that pumping from such wells has anything like the same effect—if, indeed, it has any—upon the common supply or upon the rights of others, as does pumping from wells which take the waters from within the rock, where they exist under great hydrostatic pressure.

As respects the discrimination made between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes, this is to be said: The greater demand for the gas alone, and the value which attaches to it in consequence of this demand, furnish a greater incentive for exercising the common right excessively and wastefully when the pumping is for the purpose proscribed than when it is for other purposes; and this suggestion becomes stronger when it is reflected that the proportion of gas in the commingled fluids as they exist in the rock is so small that to obtain a given quantity of gas involves the taking of an enormously greater quantity of water, and to satisfy appreciably the demand for the gas alone involves a great waste of the water from which it is collected. Thus, it well may be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose proscribed.

These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from wells penetrating the rock, and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes. If there be such a difference, it justifies the classification, for plainly a police law may be confined to the occasion for its existence. As is said in *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411: "If an evil is specially experienced in a particular branch of business, the Constitu-

tion embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms."

\* \* \*

Decree affirmed.

### TIGNER v. TEXAS.

Supreme Court of the United States, 1940.

310 U. S. 141, 84 L. ed. 1124, 60 Sup. Ct. 879, 130 A. L. R. 1321.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an appeal under § 237 (a) of the Judicial Code, as amended, 28 U. S. C. § 344, to review a judgment of the Court of Criminal Appeals of Texas sustaining the constitutionality of a Texas anti-trust law, and therefore upholding an indictment under it. Appellant was charged with participation in a conspiracy to fix the retail price of beer. Such a conspiracy is made a criminal offense by Title 19, Chapter 3, of the Texas Penal Code. Because the provisions of this law do not "apply to agricultural products or livestock in the hands of the producer or raiser," Art. 1642, Tigner challenged the validity of the entire statute and sought release in the local courts by habeas corpus. His claim has been rejected by the Texas Court of Criminal Appeals. 132 S. W. 2d 885. Essentially his contention is that the exemption granted by the Texas statute falls within the condemnation of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, as offensive to "the equal protection of the laws" which the Fourteenth Amendment safeguards. If that case controls, appellant contends, the Texas Act cannot survive and he must go free.

The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in *Connolly's* case. But it felt that time and circumstances had drained that case of vitality, leaving it free to treat the exemption as an exercise of legislative discretion. A similar attitude has been reflected by the Supreme Court of Wisconsin, *Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 593; 197 N. W. 936, and appears to underlie much recent state and federal legislation. Dealing as we are with an appeal to the Constitution, the *Connolly* case ought not to foreclose us from considering this exemption in its own setting.

The problem, in brief, is this: May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?

Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups. These

large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen. At all events legislation like that of Texas rested on this view, curbing industrial and commercial combinations, and did not visit the same condemnation upon collaborative efforts by farmers and stockmen because the latter were felt to have a different economic significance.

Since Connolly's case was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation. \* \* \*

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Another feature of Texas anti-trust legislation is relied on by Tigner to invalidate the criminal statute under which he is being prosecuted. Beginning with the first enactment in 1894, the Texas anti-trust laws have had a complicated and checkered history. At present there are two statutes directed at combination and monopoly—the one under which Tigner was indicted, and another, subjecting to civil penalties the same conduct at which the challenged criminal law is aimed. Title 126, Re-

vised Civil Statutes. From such civil proceedings, which the Attorney General initiates, no exemption is given to farmers and stockmen. Appellant urges that the divergence between civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus invalidates the whole of it. This argument is but a minor variation on appellant's main theme. It amounts to a claim that differences substantial enough to permit substantive differentiation in formulating legislative policy do not permit differentiation as to remedy.

How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors. In the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156, and, in the case of shipping combinations, by the Merchant Marine Act, *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474. In its own groping efforts to deal with the problem of monopoly, the Texas legislature has in the course of nearly half a century invoked a dozen remedies. When Iowa superimposed upon its general anti-trust law an additional penalty in the case of fire insurance combinations, this Court sustained the validity of the statute. *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401.

Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view

that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise. Here, again, we must be mindful not of abstract equivalent of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy. We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly, and so holding, we conclude that there was likewise no bar against making the exemption partial rather than complete.

Affirmed.

Mr. JUSTICE McREYNOLDS is of opinion that the judgment below should be reversed.

SKINNER v. OKLAHOMA EX REL. WILLIAMSON.

Supreme Court of the United States, 1942.

316 U. S. 535, 86 L. ed. 1655, 62 Sup. Ct. 1110.

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari.

The statute involved is Oklahoma's Habitual Criminal Sterilization Act. Okla. Stat. Ann. Tit. 57 §§ 171, et seq.; L. 1935, pp. 94 et seq. That Act defines an "habitual criminal" as a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude," either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. § 173. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. §§ 176, 177. Notice, an opportunity to be heard, and the right to a jury trial are provided. §§ 177-181. The issues triable in such a proceeding are narrow and confined. If the court or jury finds that the defendant is an "habitual criminal" and that he "may be rendered sexually sterile without detriment to his or her general health," then the court "shall render judgment to the effect that said defendant be rendered sexually sterile" (§ 182) by the operation of vasectomy in case of a male and of salpingectomy in case of a female. § 174. Only one other provision of the Act is material here, and that is § 195, which pro-

vides that "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."

Petitioner was convicted in 1926 of the crime of stealing chickens, and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with firearms, and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms, and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude, and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision. 189 Okla. 235, 115 P. 2d 123.

Several objections to the constitutionality of the Act have been pressed upon us. \* \* \* We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is, its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma, grand larceny is a felony. Okla. Stats. Ann. Tit. 21, §§ 1705, 5. Larceny if grand larceny when the property exceeds \$20 in value. Id. § 1704. Embezzlement is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled." Id. § 1462. Hence, he who embezzles property worth more than \$20 is guilty of a felony. A clerk who appropriates over \$20 from his employer's till (id. § 1456) and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony (id. § 1719); and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Id. § 1455. Hence, no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. Thus, the nature of the two crimes is intrinsically the same and they are punishable in the same manner. Furthermore, the line between them follows close distinctions—distinctions comparable to those highly technical ones which shaped the common law as to "trespass" or "tak-

ing." Bishop, Criminal Law (9th ed.) Vol. 2, §§ 760, 799, et seq.  
\* \* \*

It was stated in *Buck v. Bell*, 274 U. S. 200, that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is "the usual last resort of constitutional arguments." 274 U. S. p. 208. Under our constitutional system the States in determining the reach and scope of particular legislation need not provide "abstract symmetry." *Patson v. Pennsylvania*, 232 U. S. 138, 144. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. See *Bryant v. Zimmerman*, 278 U. S. 63, and cases cited. It was in that connection that Mr. Justice Holmes, speaking for the Court in *Bain Peanut Co. v. Pinson*, 282 U. S. 499, 501, stated, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing "degrees of evil" \* \* \* by our ruling in *Tigner v. Texas*, 310 U. S. 141, 147, that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." And see *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362. Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. See *Moore v. Missouri*, 159 U. S. 673; *Hawker v. New York*, 170 U. S. 189; *Finley v. California*, 222 U. S. 28; *Patson v. Pennsylvania*, supra. For a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining "its restrictions to those classes of cases where the need is deemed to be clearest." *Miller v. Wilson*, 236 U. S. 373, 384. \* \* \* As stated in *Buck v. Bell*, supra, p. 208, "\* \* \* the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."

But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not

to re-examine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins*, *supra*; *Gaines v. Canada*, 305 U. S. 337. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, "with reference to the time when the fraudulent intent to convert the property to the taker's own use" arises. *Riley v. State*, *supra*, 64 Okla. Cr. at p. 189, 78 P. 2d p. 715. We have not the slightest basis for inferring that that line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. See *Smith v. Wayne Probate Judge*, 231 Mich. 409, 420-421, 204 N. W. 40. In *Buck v. Bell*, *supra*, the Virginia statute was upheld though it applied only to feeble-minded persons in institutions of the State. But it was pointed out that "so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached." 274 U. S. p. 208. Here there is no such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not. If such a classification were permitted, the technical common law concept of a "trespass" (*Bishop, Criminal Law*, 9th ed., vol. 1 §§ 566, 567) based on distinctions which are "very largely dependent upon history for explanation" (*Holmes, The Common Law*, p. 73) could readily become a rule of human genetics.

It is true that the Act has a broad severability clause. But we will not endeavor to determine whether its application would solve the equal protection difficulty. The Supreme Court of Oklahoma sustained the Act without reference to the severability clause. We have therefore a situation where the Act as construed and applied to petitioner is allowed

to perpetuate the discrimination which we have found to be fatal. Whether the severability clause would be so applied as to remove this particular constitutional objection is a question which may be more appropriately left for adjudication by the Oklahoma court. *Dorchy v. Kansas*, 264 U. S. 286. That is re-emphasized here by our uncertainty as to what excision, if any, would be made as a matter of Oklahoma law. *Cf. Smith v. Cahoon*, 283 U. S. 553. It is by no means clear whether, if an excision were made, this particular constitutional difficulty might be solved by enlarging on the one hand or contracting on the other (*cf. Mr. Justice Brandeis dissenting, National Life Ins. Co. v. United States*, 277 U. S. 508, 534-535) the class of criminals who might be sterilized.

Reversed.

MR. CHIEF JUSTICE STONE, concurring.

I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause.

If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none. See *Rosenthal v. New York*, 226 U. S. 260, 271; *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227; *Patson v. Pennsylvania*, 232 U. S. 138, 144.

Moreover, if we must presume that the legislature knows—what science has been unable to ascertain—that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. And so I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demand of due process. \* \* \*

MR. JUSTICE JACKSON concurring:

I join the CHIEF JUSTICE in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of MR. JUSTICE DOUGLAS that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other. \* \* \*

## RAILWAY EXPRESS AGENCY v. NEW YORK.

Supreme Court of the United States, 1948.  
336 U. S. 106, 93 L. ed. 533, 69 Sup. Ct. 463.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 124 of the Traffic Regulations of the City of New York promulgated by the Police Commissioner provides:

"No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Appellant is engaged in a nation-wide express business. It operates about 1,900 trucks in New York City and sells the space on the exterior sides of these trucks for advertising. That advertising is for the most part unconnected with its own business. It was convicted in the magistrate's court and fined. The judgment of conviction was sustained in the Court of Special Sessions. 188 Misc. 342, 67 N. Y. S. (2d) 732. The Court of Appeals affirmed without opinion by a divided vote. 297 N. Y. 703, 77 N. E. (2d) 13. The case is here on appeal. Judicial Code § 237(a), 28 U. S. C. § 344(a), as amended, (now § 1257) [F. C. A. 28 § 1257].

The Court in *Fifth Ave. Coach Co. v. New York*, 221 U. S. 467, sustained the predecessor ordinance to the present regulation over the objection that it violated the due process and equal protection clauses of the Fourteenth Amendment. It is true that that was a municipal ordinance resting on the broad base of the police power, while the present regulation stands or falls merely as a traffic regulation. But we do not believe that distinction warrants a different result in the two cases.

The Court of Special Sessions concluded that advertising on vehicles using the streets of New York City constitutes a distraction to vehicle drivers and to pedestrians alike and therefore affects the safety of the public in the use of the streets. We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See *Olsen v. Nebraska*, 313 U. S. 236. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

The question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of

such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patson v. Pennsylvania*, 232 U. S. 138, 144; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 198, 199; *Metropolitan Casualty Co. of New York v. Brownell*, 294 U. S. 580, 585, 586. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. *Central Lumber Co. v. South Dakota*, 236 U. S. 157, 160.

\* \* \*

Affirmed.

MR. JUSTICE RUTLEDGE acquiesces in the Court's opinion and judgment, *dubitante* on the question of equal protection of the laws.

MR. JUSTICE JACKSON, concurring.

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of denial of equal pro-

tection are frequently asserted, they are rarely sustained. But the Court frequently uses the due process clause to strike down measures taken by municipalities to deal with activities in their streets and public places which the local authorities consider to create hazards, annoyances or discomforts to their inhabitants. And I have frequently dissented when I thought local power was improperly denied. \* \* \*

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

This case affords an illustration. Even casual observations from the sidewalks of New York will show that an ordinance which would forbid all advertising on vehicles would run into conflict with many interests, including some, if not all, of the great metropolitan newspapers, which use that advertising extensively. Their blandishment of the latest sensations is not less a cause of diverted attention and traffic hazard than the commonplace cigarette advertisement which this truck-owner is forbidden to display. But any regulation applicable to all such advertising would require much clearer justification in local conditions to enable its enactment than does some regulation applicable to a few. I do not mention this to criticize the motives of those who enacted this ordinance, but it dramatizes the point that we are much more likely to find arbitrariness in the regulation of the few than of the many. Hence, for my part, I am more receptive to attack on local ordinances for denial of

equal protection than for denial of due process, while the Court has more often used the latter clause.

In this case, if the City of New York should assume that display of any advertising on vehicles tends and intends to distract the attention of persons using the highways and to increase the dangers of its traffic, I should think it fully within its constitutional powers to forbid it all. The same would be true if the City should undertake to eliminate or minimize the hazard by any generally applicable restraint, such as limiting the size, color, shape or perhaps to some extent the contents of vehicular advertising. Instead of such general regulation of advertising, however, the City seeks to reduce the hazard only by saying that while some may, others may not exhibit such appeals. The same display, for example, advertising cigarettes, which this appellant is forbidden to carry on its trucks, may be carried on the trucks of a cigarette dealer and might on the trucks of this appellant if it dealt in cigarettes. And almost an identical advertisement, certainly one of equal size, shape, color, and appearance, may be carried by this appellant if it proclaims its own offer to transport cigarettes. But it may not be carried so long as the message is not its own but a cigarette dealer's offer to sell the same cigarettes. \* \* \*

That the difference between carrying on any business for hire and engaging in the same activity on one's own is a sufficient one to sustain some types of regulations of the one that is not applied to the other, is almost elementary. But it is usual to find such regulations applied to the very incidents wherein the two classes present different problems, such as in charges, liability and quality of service.

The difference, however, is invoked here to sustain a discrimination in a problem in which the two classes present identical dangers. The courts of New York have declared that the sole nature and purpose of the regulation before us is to reduce traffic hazards. There is not even a pretense here that the traffic hazard created by the advertising which is forbidden is in any manner or degree more hazardous than that which is permitted. It is urged with considerable force that this local regulation does not comply with the equal protection clause because it applies unequally upon classes whose differentiation is in no way relevant to the objects of the regulation.

As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.  
\* \* \*

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those

who do so for hire be prohibited, while those who do so for their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price. \* \* \*

Of course, this appellant did not hold itself out to carry or display everybody's advertising, and its rental of space on the sides of its trucks was only incidental to the main business which brought its trucks into the streets. But it is not difficult to see that, in a day of extravagant advertising more or less subsidized by tax deduction, the rental of truck space could become an obnoxious enterprise. While I do not think highly of this type of regulation, that is not my business, and in view of the control I would concede to cities to protect citizens in quiet and orderly use for their proper purposes of the highways and public places, see dissent in *Saia v. New York*, 334 U. S. 558, I think the judgment below must be affirmed.

NASHVILLE, CHATTANOOGA & ST. LOUIS RY. v.  
BROWNING.

Supreme Court of the United States, 1940.  
310 U. S. 362, 84 L. ed. 1254, 60 Sup. Ct. 968.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.  
\* \* \*

This brings us to the Company's claims under the Fourteenth Amendment. The Railway first asserts that it is a victim of such invidious discrimination in the administration of Tennessee's tax statutes as is proscribed by the guaranty of "the equal protection of the laws." The claim is founded upon the following circumstances. As we have already indicated, there are two separate modes for the assessment of property in Tennessee, each with its distinctive procedure. The property of public service corporations is assessed by the Commission; all other property by local officials. This broad classification, separating two very different types of property, has been reflected, according to petitioner's contention, by a corresponding difference in the bases of assessment. For more than forty years, so it was urged before the courts of Tennessee and later here, the county assessors have systematically valued property at far less than its true worth, while utility and railroad properties have been assessed by the Commission at full value. This systematic

differentiation, petitioner claims, has been continuous and state-wide in its operation; has been "repeatedly brought to the attention of the General Assembly of the State of Tennessee"; has been left uncorrected by that body; and until the present case, so far as we are informed, has been unchallenged. In support of its claim the Railway adduced official and unofficial reports as well as a volume of affidavits from local assessing officials in the counties through which its lines run—all to the effect that locally assessed property was undervalued. The issue of forbidden discrimination was thus squarely raised below. But the Tennessee Supreme Court did not deem petitioner's evidence sufficient to overcome the presumption that in the exercise of its reviewing function, the Board had equalized assessments in accordance with the command of state law. We should be reluctant on such a question to reject the state court's determination as without foundation, and there is not enough in the record to warrant its repudiation. At the bar of this Court petitioner proffered the minutes of the State Board of Equalization—not in the record—to show the absence of equalization. Considering the nature of the litigation, the vigor and ability with which it was contested before the Circuit Court of Davidson County, on motion for new trial there, on the original appeal to the Supreme Court of Tennessee and finally on petition for rehearing, it would indeed turn this Court into a board of tax review if we were now to receive evidence not offered in any of the tribunals below.

But were we to take judicial notice of that which these minutes were offered to show, and therefore to regard the ground taken by the state court as a strained evasion of the differentiation between utility property on the one hand and all the rest on the other, we should still find no denial of the equal protection of the laws. It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. \* \* \* [Citations omitted.] All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment. *Greene v. Louisville & I. R. Co.*, 244 U. S. 499; *Louisville & N. R. Co. v. Greene*, 244 U. S. 522. This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was de-

signed to assure. See *Puget Sound Co. v. King County*, 264 U. S. 22, 27.

That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the commonplaces of taxation and of constitutional law. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Pacific Express Co. v. Sieber*, 142 U. S. 339; *Florida Central & P. R. Co. v. Reynolds*, 183 U. S. 471; *Southern Ry. Co. v. Watts*, 260 U. S. 519; *Atlantic Coast Line v. Daughton*, 262 U. S. 413; *Rapid Transit Corp. v. New York*, 303 U. S. 573. Since, so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, the only question relevant for us is whether the state has done so. If the discrimination of which the Railway complains had been formally written into the statutes of Tennessee, challenge to its constitutionality would be frivolous. If the state Supreme Court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment. Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embodied traditional ways of carrying out the state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. Compare *Carino v. Insular Government*, 212 U. S. 449, 459. And if the state Supreme Court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an exposure of the fiction is not enough to establish its unconstitutionality. Fictions have played an important and sometimes fruitful part in the development of law; and the Equal Protection Clause is not a command of candor. So we are of opinion that such a discrimination, not invidious but long-sanctioned and indeed conventional, would not be offensive to the Fourteenth Amendment simply because Tennessee had reached it by a circuitous road. It is not the Fourteenth Amendment's function to uproot systems of taxation inseparable from the state's tradition of fiscal administration and ingrained in the habits of its people. \* \* \*

Affirmed.

## NOTES

1. In *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. 192 (1912) a statute of Montana imposing a license fee on hand laundries was held not to constitute a denial of the equal protection of the laws because it did not apply to steam laundries, and because it exempted from its operation laundries not employing more than two women.

2. In *Metropolis Theater Co. v. Chicago*, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. 441 (1913) it was held that an ordinance grading a municipal license fee for theaters according to the price asked for the highest priced seats, rather than according to revenue, was not so palpably arbitrary as to violate the equal protection guaranty, although it was shown that some of the theaters charging a higher admission had less revenue than those charging a smaller price, and therefore paying lower license fees.

3. In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. 423 (1901) a state statute requiring the proprietors of warehouses situated on the right of way of a railroad to secure a license from a state commission, and containing no such requirement with respect to warehouses not so situated but doing the same kind of business, was held not to violate the equal protection clause.

4. In *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. 43 (1900) a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted from the tax planters and farmers grinding and refining their own sugar and molasses, was held not to work an unconstitutional discrimination.

5. In *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. 370 (1916) the court sustained a statute placing taxes additional to the usual occupation taxes on persons who offered, with merchandise bargained or sold in the course of trade, coupons, profit-sharing certificates, or the like, as against the contention that it was arbitrary and unreasonable, in that the only difference between the other merchants and those who used trading stamps was a difference in the method of advertising.

6. Under a Pennsylvania statute all moneyed securities were subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which were taxed at three mills on the dollar of their nominal or par value. In an action by the state to enforce the payment of a tax assessed against the defendant railroad company, one of the contentions advanced in the Supreme Court was that the law violated the equal protection of the laws. In sustaining the tax, the Supreme Court, through Mr. Justice Bradley, said: "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. \* \* \* We think we are safe in saying that the Fourteenth Amendment was not intended to compel the states to adopt an iron rule of equal taxation." *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. 533 (1890).

7. In holding invalid as a violation of the equal protection guaranty a Pennsylvania statute which imposed a tax upon the gross receipts of all corporations owning or operating any device for the transportation of passengers or freight,

the Supreme Court, in an opinion by Justice Butler, said: "The gross receipts of incorporated operators are taxed, while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having reasonable relation to the subject of the legislation." Justices Holmes, Brandeis and Stone delivered dissenting opinions, taking the view that there were real and important differences between a business carried on in corporate form and the same business carried on by natural persons and that such differences justified the imposition of special taxes on corporations. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. 553 (1928).

8. An Indiana statute made it a misdemeanor for any person, firm, association, or corporation to operate a store without first obtaining a license, and prescribed a graduated annual license fee based on the number of stores conducted under a single ownership or management. In sustaining the statute, as against the claim that the classification was unreasonable and arbitrary and resulted in a denial of the equal protection of the laws, the Supreme Court said: "In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it." Justices Sutherland, Van Devanter, McReynolds and Butler dissented. *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 75 L. ed. 1248, 51 Sup. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536 (1931).

9. In holding invalid a Kentucky graduated state tax on gross sales, the rates of which varied in proportion to the volume of sales in retail stores owned, operated or controlled by the same merchant, the court distinguished *State Board of Tax Commissioners v. Jackson*, *supra*, and other decisions applying the doctrine of that case, and said: "The Kentucky statute ignores the form of organization and the method of conducting business. The taxable class is retail merchants, whether individuals, partnerships, or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise. The law arbitrarily classified these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other." Justices Cardozo, Brandeis and Stone dissented, citing prior decisions, including the chain store cases, as justifying classification according to size of the business enterprise. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 79 L. ed. 1054, 55 Sup. Ct. 525 (1935).

10. Plaintiffs brought an action of mandamus to compel the refund of taxes alleged to have been exacted illegally. The state code provided for the taxation of national and state bank shares and competitive capital at one rate and for the taxation of non-competing investments at a rate which was only from one-fifth to one-seventh as great. The assessor and the local board of review had properly applied the bank rate in taxing the shares of a number of competing domestic

corporations, but the county auditor, in making up the tax list, wrongfully changed these assessments. Conceding that there was discrimination in favor of shares in the competing domestic corporations, the state Supreme Court denied relief on the ground that the auditor was without authority to make the alteration and that his act and the ensuing collection were void and not attributable to the state. It was held that the petitioners had no other remedy than to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection. In reversing this judgment, the Supreme Court, through Mr. Justice Brandeis, held that the state was responsible for the consequences of the illegal acts of its taxing officers and that the state court, in giving judgment against the bank, had in effect ratified the act of the state in retaining the taxes known to have been wrongfully collected. The court further held that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of the federal Constitution cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. ed. 265, 52 Sup. Ct. 133 (1931). Other leading cases involving discrimination in the administration of tax laws are *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 67 L. ed. 340, 43 Sup. Ct. 190, 28 A. L. R. 979 (1923); *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23, 76 L. ed. 146, 52 Sup. Ct. 48 (1931); *Hillsborough Township v. Cromwell*, 326 U. S. 620, 90 L. ed. 358, 66 Sup. Ct. 445 (1946).

11. For a recent discussion of problems arising under the equal protection clause, particularly with respect to the legislative power of classification, see Tussman and TenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).

## KENTUCKY FINANCE CORPORATION v. PARAMOUNT AUTO EXCHANGE CORPORATION.

Supreme Court of the United States, 1923.  
262 U. S. 544, 67 L. ed. 1112, 43 Sup. Ct. 636.

Error to a judgment of the Supreme Court of Wisconsin, sustaining two orders, one for the examination of the plaintiff before answer, and the second striking out its complaint and dismissing its action for failure to comply with the first.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

The plaintiff in error, a Kentucky corporation, brought an action of replevin in a state court at Milwaukee, Wisconsin, against the defendant in error, a Wisconsin corporation, to recover an automobile,—the right of recovery asserted in the complaint being put on the ground that the plaintiff was the owner and entitled to the possession of the automobile, that one Allen had unlawfully taken it from the plaintiff's possession at Louisville, Kentucky, had fraudulently removed it to Milwaukee, and had there wrongfully delivered it to the defendant, and that the defendant was unjustly withholding it from the plaintiff under some groundless claim derived from Allen. The defendant appeared and obtained from the court an order requiring the plaintiff's secretary, who resided at Louisville and was in the plaintiff's service there, to appear

in Milwaukee at a fixed time before a designated court commissioner, to bring with him all papers, files and records of the plaintiff which were under his control and relevant to the controversy, and then and there to submit to an examination by the defendant. The order was sought and granted on the ground that the examination would better enable the defendant to plead to the complaint, which as yet it had not done. The plaintiff was not engaged in any business in Wisconsin, nor had it complied with the law of that state prescribing conditions on which it might do so. It had no property in the state other than the automobile and it had gone into the state only for the purpose of instituting and prosecuting the action to repossess itself of that vehicle. Its secretary was not within the state, nor did it have any representative there other than the attorneys who were prosecuting the action in its behalf. For itself and its secretary it consented that such an examination as was sought might be held at Louisville at any time, and before any officer, the court might designate, but it objected to any order requiring that the examination be had in Milwaukee. The objection was overruled and the court put in the order a direction that the defendant tender to the plaintiff for its secretary the railroad fare from the southern boundary of Wisconsin to Milwaukee and return, being \$4.74, and one day's witness fee, being \$1.50. The tender was made and declined and the secretary, with the plaintiff's approval, refused to comply with the order. Because of this the court, on the defendant's motion and over the plaintiff's objection, made a further order striking the plaintiff's complaint from the files and dismissing its cause of action, with costs. On appeal to the Supreme Court of the state both orders were sustained over the plaintiff's contention that they and the statute under which they were made violate the due process and equal protection clauses of the Fourteenth Amendment. 171 Wis. 586.

[The procedure of the trial court conformed to a Wisconsin statutory provision applicable to foreign corporations. Other statutory provisions made a resident of the state subject to such oral interrogation only in the county of his residence, and where the party was a non-resident natural person the examination could be had in Wisconsin only if he could be personally served therein with notice and subpoena and then only in the county where such service was had.]

By subd. 7 of § 4096, before quoted, an exception was made as to foreign corporations, whereby examinations within the state might be ordered and compelled against them regardless of their nonresidence and of any inability to obtain service on them in the state. Thus they were subjected to a rule much more onerous than that applicable to nonresident individuals in like situations, and also more onerous than that applicable to resident suitors, whether individuals or corporations. The Supreme Court justified this difference in legislative treatment and also the order for an examination in this case on the ground that they amounted to no more than a reasonable exercise of the authority of the

state over a nonresident corporation coming voluntarily into the state to seek a remedy in her courts against a resident defendant.

We take a different view of the matter. According to the sworn complaint, to the allegations of which due regard must be had, the automobile belonged to the plaintiff. It had been unlawfully taken from the plaintiff's possession in Kentucky and put in the defendant's possession in Wisconsin. It did not get into the latter state through any act of the plaintiff; nor did the acts by which it got there make it any the less the plaintiff's property. Only by going into that state and there instituting an action of replevin against the wrongful possessor could the plaintiff repossess itself of its property. Unless it took that course its property would be lost. The state court whose aid it invoked was one whose jurisdiction was general and adequate for the purpose. In the circumstances, the right to bring the action was plain. See *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387; *Chicago Title & T. Co. v. Bashford*, 120 Wis. 281; *Sioux Remedy Co. v. Cope*, 235 U. S. 197. To have denied that right would, in effect, have deprived the plaintiff of its property and have been an intolerable injustice. That the plaintiff owed its corporate existence to Kentucky did not enable Wisconsin to treat its plight with indifference. It was a "person" within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment. *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 396; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 592; *Smyth v. Ames*, 169 U. S. 466, 522; *Atchison, T. & S. F. R. Co. v. Vosburg*, 238 U. S. 56. The latter clause declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," meaning, of course, the protection of laws applying equally to all in the same situation. The words "within its jurisdiction" are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that state, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking. See *Southern R. Co. v. Greene*, 216 U. S. 400; *Blake v. McClung*, 172 U. S. 239. And we think there is no tenable ground for regarding it as any less entitled to the equal protection of the laws in that state than an individual would have been in the same circumstances; for, as was held in *Atchison, Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 154, "a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

No doubt a corporation of one state seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry.*

Co. v. Eggen, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purpose of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that, as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

We hold that the statute as it was applied in this case was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause.

Judgment reversed.

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE HOLMES concurs: \* \* \* It cannot be that the due process clause of the Fourteenth Amendment deprives a state of the power to authorize its courts to so mold their process as to secure, in this way, the adequate presentation of a case.

To sustain the contention that the statute denies to plaintiff equal protection of the laws would seem to require the Court to overrule *Blake v. McClung*, 172 U. S. 239, 260, 261, and many other cases. The plaintiff, a foreign corporation not doing business within the state of Wisconsin, was not a person "within its jurisdiction." Moreover, the statutory provision complained of put nonresidents substantially upon an equality with residents. Compare *Kane v. New Jersey*, 242 U. S. 160, 167. No question of interstate commerce is involved. In my opinion the equal protection clause does not prevent Wisconsin from molding, in the case of foreign corporations, the details of its judicial procedure to accord with the requirements of justice.

#### NOTES

1. In *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. 1132 (1886) the Supreme Court for the first time held that the word "person" in the Fourteenth Amendment included corporations. In this case Chief Justice Waite advised counsel as follows: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." In *Connecticut General Life Insur-*

ance Co. v. Johnson, 303 U. S. 77, 82 L. ed. 673, 58 Sup. Ct. 436 (1938), Mr. Justice Black dissented, saying: "I do not believe that the word 'person' in the Fourteenth Amendment includes corporations. \* \* \* A constitutional interpretation that is wrong should not stand. I believe this court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations." For an analysis of the historical evidence which sheds much light on the question at issue, see Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L. J. 371 (1938), 1 Selected Essays on Constitutional Law (1938), 236. See also Boudin, Truth and Fiction about the Fourteenth Amendment, 16 N. Y. U. L. Q. Rev. 19 (1938).

In *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 93 L. ed. 1544, 69 Sup. Ct. 1291 (1949), Mr. Justice Douglas, with the concurrence of Mr. Justice Black, dissented on the ground that a corporation is not a "person" within the meaning of the equal protection clause. The dissent said: "We are dealing with a question of vital concern to the people of the nation. It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation." Mr. Justice Jackson, who wrote the opinion of the court, in an independent statement which he deemed necessary "to complete the record," pointed out that since the *Santa Clara* decision the court had consistently proceeded on the assumption that corporations were entitled to the protection of the Fourteenth Amendment.

2. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165 (1898) held, *inter alia*, that a foreign corporation not doing business in Tennessee "under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors" could not rely upon the equal protection clause in attacking a statute of that state giving preference to the claims of resident creditors in the distribution of assets of insolvent foreign mining and manufacturing corporations admitted to do business in the state. In its opinion sustaining this statute the court said: "That prohibition manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.' Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution, and to interpret the clause in question as if they were not to be found in that instrument." Is the dissenting opinion in the principal case correct in its assertion that the result of that case "would seem to require" the court to overrule *Blake v. McClung*?

3. Arkansas statutes required actions for personal injuries, if against a domestic corporation, to be brought in a county where it had a place of business or in which its chief officer resided, and, if against a natural person, in a county where he resided or might be found; but they permitted such actions, if against a foreign corporation, to be brought in any county of the state. The Supreme Court (Justices Holmes and Brandeis dissenting) found no sufficient reason for this difference as to venue of actions so far as foreign corporations having a fixed place of business in the state and a resident agent were concerned, and as to them held the statute to constitute a denial of the equal protection of the laws. The court added: "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with dif-

ferently. But there are other subjects as to which such a course is not admissible; the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made." *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. ed. 1165, 47 Sup. Ct. 678 (1927).

4. That domestic corporations may for some purposes be exempted from regulations imposed upon those of foreign origin is exemplified in *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580, 79 L. ed. 1070, 55 Sup. Ct. 538 (1935), sustaining an Indiana statute applicable only to foreign insurance companies which declared that "no condition or agreement not to sue for a period of less than three years shall be valid." The court said: "There is no showing that the situation of foreign corporations, writing casualty insurance contracts in Indiana, is so similar to that of domestic corporations as to preclude any rational distinction between them as regards the time required for negotiating settlements of claims and the determination whether suits upon them should be prosecuted within or without the state. Where the record is silent, we cannot presume to declare that there is such similarity, or to say that a state is prohibited from making any distinction in the length of time within which suit must be brought. It is not beyond the range of probability that foreign casualty companies, as distinguished from domestic companies, generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state. \* \* \* We cannot say that these considerations may not have moved the legislature to insist that a longer time should be given for bringing suits against foreign companies than the latter." Justices Van Devanter, McReynolds, Sutherland and Butler dissented.

## Section 2.—Race Discrimination and the Problem of "State Action."

### CIVIL RIGHTS CASES.

Supreme Court of the United States, 1883.

109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. 18.

These cases were all founded on the first and second sections of the act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An Act to protect all Citizens in their Civil and Legal Rights." 18 Stat. 335. Two of the cases, those against Stanley and Nichols, were indictments for denying to persons of color the accommodations and privileges of an inn or hotel; two of them, those against Ryan and Singleton, were, one an information, the other an indictment, for denying to individuals the privileges and accommodations of a theatre, the information against Ryan being for refusing a colored person a seat in the dress circle of Maguire's theatre in San Francisco; and the indictment against Singleton was for denying to another person, whose color was not stated, the full enjoyment of the accommodations of the theatre known as the Grand Opera House in New York, "said denial not being made for any reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." \* \* \* The cases of Stanley, Nichols, and Singleton, came up on certificates of division of opinion between the judges below as to the constitutionality of the first and second sections of the act

referred to; and the case of Ryan, on a writ of error to the judgment of the Circuit Court for the District of California sustaining a demurrer to the information.

The Stanley, Ryan, Nichols, and Singleton cases were submitted together, by the Solicitor-General at the last term of court, on the 7th day of November, 1882. There were no appearances and no briefs filed for the defendants. The statute follows:

"Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

MR. JUSTICE BRADLEY delivered the opinion of the Court.

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand. \* \* \*

Are these sections constitutional? The first section, which is the principle one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare, that in all inns, public conveyances, and places of amusement, colored citizens, whether

formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*. The second section makes it a penal offence in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that Congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the states. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind

referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. \* \* \*

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the Amendment are against state laws and acts done under state authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the Amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the Amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the states. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five

thousand dollars." In *Ex parte Virginia*, 100 U. S. 339, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the *Virginia* case, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the state actually laid down any such rule of disqualification, or not, the state, through its officer, enforced such a rule: and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering.

\* \* \*

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be

remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States v. Harris*, 106 U. S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That Amendment prohibits the states from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the states only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of states. And whether Congress, in the exercise of its power to regulate commerce amongst the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This Amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and it gives Congress power to enforce the amendment by appropriate legislation.

This Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States. \* \* \*

The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive

them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings. \* \* \* The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. \* \* \* It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that Amendment and in accordance with it. \* \* \*

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

[MR. JUSTICE HARLAN wrote a dissenting opinion.]

#### NOTE

1. In several cases, decided during the period following the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, the Supreme Court considered the constitutionality of various provisions of the federal Civil Rights Acts, and in others it dealt with the question of whether the particular rights claimed to have been violated were granted or secured by the Constitution or laws of the United States.

In *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588 (1875) the defendants were indicted for "banding" and "conspiring" together to hinder and prevent Negro citizens from the exercise of certain rights and privileges granted to them under the First, Second, Fourteenth and Fifteenth Amendments. The Supreme Court, affirming a lower court decision arresting judgment entered on a verdict of guilty, found that the counts alleging such interference were objectionable because the rights asserted were not "granted or secured by the Constitution or laws of the United States," within the meaning of the Enforcement Act of 1870. Concerning the alleged violation of the equal protection clause of the Fourteenth Amendment, the court held that the conspiracy provision of the statute did not afford protection unless such violation was on

account of race, color or previous condition of servitude. The court said: "When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States."

In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563 (1876) a section of the Enforcement Act of 1870, providing punishment for an inspector of election who should wrongfully refuse to receive or count the vote of any Negro citizen, was held invalid because it did not in express terms limit the offense to a wrongful discrimination on account of race, color or previous condition of servitude.

In *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676 (1880) the injunction of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was held to be infringed by a Virginia county judge who excluded Negroes from juries in violation of a specific provision of the Civil Rights Acts, although not authorized to do so by Virginia law. Upon the question whether his act was that of the state, so that he could be punished under the statute, the court said: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." To the same effect was *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664 (1880), where, however, the discrimination was authorized by a West Virginia statute controlling the selection of grand and petit jurors.

In *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717 (1880) provisions of the Civil Rights Acts making it a criminal offense for officers of elections at which representatives in Congress were voted for to violate any duty imposed upon them in regard to such elections by any state or federal law, were upheld under the federal power to control elections conferred by Art. I, § 4, cl. 1.

In *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. 601 (1883) a provision of the Civil Rights Acts (popularly known as the Ku Klux Act) making it a criminal offense for two or more persons to conspire or go in disguise upon the highway or upon another's premises for the purpose of depriving any persons of the equal protection of the laws or equal privileges and immunities under the laws, was held invalid on the ground that Congress has no power to punish a private person for invasion of his fellow citizens' rights conferred by the state upon its residents. The court said that as "the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the state or their administration by her officers" it was not warranted by any clause in the Fourteenth Amendment.

On the other hand, in *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. 152 (1884), the conviction of private individuals for beating and wounding a Negro while exercising his right to vote for a member of Congress was sustained under the conspiracy provision of the Civil Rights Acts as a valid exercise of the power granted to Congress to enforce the Fifteenth Amendment. The court, through Mr. Justice Miller, said: "The reference to cases in this court in which the power of Congress under the first section of

the Fourteenth Amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanctions in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that Amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States, essential to the healthy organization of the government itself."

In *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. 35 (1884) the right of a citizen under the Homestead Acts, having made an entry on public land within the limits of a state, to continue to reside on the land for five years, for the purpose of perfecting his title to a patent, was held to be a right dependent on and secured by the laws of the United States, and hence a conspiracy to prevent the exercise of this right was held to be a violation of the conspiracy provision of the Civil Rights Acts.

The conspiracy statute was also held to have been violated in *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. 617 (1892), where the defendants attacked persons in the custody of a United States marshal, causing the death of some of them. The court held that the right of a person arrested and in custody under a lawful commitment to answer for an offense against the United States to be secure against lawless violence came within the protection of the conspiracy provision as a right created and secured by the Constitution and laws of the United States.

Another violation of the conspiracy statute was held to have been involved in *In re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. 959 (1895), where the defendants, private individuals, assaulted and maltreated a citizen because he had informed the appropriate authorities of violations of the federal internal revenue laws. The court said: "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." To the same effect is *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. 993 (1900).

On the other hand, in *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. 6 (1906), the conspiracy provision was held not to be applicable where individuals were charged with compelling Negro citizens, solely because of their race, by force and intimidation, to desist from performing their contracts of employment. The civil rights statute involved provided that all persons had the same right to make and enforce contracts as was enjoyed by white citizens, and should be subject to like pains, penalties, taxes, licenses and exactions, and to no other. The court held that the Fourteenth Amendment did not justify the legislation, since its prohibitions applied to state action and here no act of state authorities was involved. It was also held that the Thirteenth Amendment afforded no basis for the statute, since that Amendment was a denunciation of the condition of slavery, reaching every race and every individual, and not a declaration in favor of the colored race or an attempt to commit that race to the care of the nation. Justices Harlan and Day dissented.

HOME TELEPHONE & TELEGRAPH CO.  
v. LOS ANGELES.Supreme Court of the United States, 1913.  
227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. 312.

[The telephone company filed a bill for an injunction against the city of Los Angeles in the District Court of the United States to restrain enforcement by the city of an ordinance which prescribed telephone rates. The company alleged that the rates prescribed were so low that to enforce compliance with them would deprive it of its property in violation of the due process clause of the Fourteenth Amendment. The city pleaded to the jurisdiction, asserting that there was a like due process clause in the California state constitution and that if the ordinance was lacking in due process it would be invalid under the state constitution, that in that contingency the ordinance could not be considered "state" action within the prohibition of the Fourteenth Amendment but only the unauthorized act of a state agent, and therefore the plaintiff could not make out a case for relief in a federal court unless upon proceedings had in the state courts the latter should sustain the ordinance as authorized by the state. The District Court sustained the plea and dismissed the bill, and this appeal was taken.]

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court.

\* \* \*

1. By the proposition the prohibitions and guarantees of the Amendment are addressed to and control the states only in their complete governmental capacity, and as a result give no authority to exert federal judicial power until by the decision of a court of last resort of a state, acts complained of under the Fourteenth Amendment have been held valid and therefore state acts in the fullest sense. To the contrary the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, in whatever form exerted.

2. As previously stated, the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by state officers which are within the scope of the power conferred by the state. The proposition hence applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of a state is within the reach of the Amendment unless such act can be held to be the act of the state by the application of such law of agency. In other words, the proposition is that the Amendment deals

only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power. \* \* \*

[After quoting from *Virginia v. Rives*, 100 U. S. 313, *Ex parte Virginia*, 100 U. S. 339 and *Yick Wo v. Hopkins*, 118 U. S. 356.] In *Raymond v. Traction Company*, 207 U. S. p. 20, the whole subject—almost in the identical aspect<sup>1</sup> which is here involved—came under consideration. The case concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a federal court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution in that the board had “disobeyed the authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property,” the act of the subordinate board could not be deemed the act of the state. This contention was held to be unsound and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that as the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment “constitutes a federal question beyond all controversy.” It was then said (pp. 35-36):

“The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. \* \* \* Acting under the constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the Fourteenth Amendment are not confined to the action of the state through its legislature, or

through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that, whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state." \* \* \*

Reversed.

#### NOTES

1. An earlier decision, *Barney v. New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. 502 (1904) held that federal courts, in the absence of diversity of citizenship, have no jurisdiction to enjoin state administrative action alleged to contravene the Fourteenth Amendment when such action is prohibited by state law. Although the opinion in the principal case did not expressly overrule the *Barney* decision, the theory on which that case was decided—that action unauthorized by state law is not state action within the meaning of the Fourteenth Amendment—was plainly disavowed. In accord with the principal case is *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. ed. 265, 52 Sup. Ct. 133 (1931), holding that a state is responsible for the consequences of the illegal acts of its taxing officers even though done without authority of state law, the court saying: "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law." Compare *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764 (1908), holding that a suit to enjoin a state Attorney-General from enforcing an unconstitutional statute is not a suit against a state prohibited by the Eleventh Amendment, since the officer is stripped of his official or representative character and is subjected to the consequences of his individual conduct. The cases are discussed briefly in *Howard, The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1931-1932*, 81 U. of Pa. L. Rev. 505, 528-531 (1933). For more extended analysis of the issues, see *Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 Harv. L. Rev. 969 (1927); *James, Federal Equity Jurisdiction to Enjoin Acts of State Officers*, 18 Iowa L. Rev. 1 (1932).

2. In *Snowden v. Hughes*, 321 U. S. 1, 88 L. ed. 497, 64 Sup. Ct. 397 (1944) plaintiff brought suit in a federal court to recover damages for alleged infringement of his civil rights secured by the Fourteenth Amendment and various sections of the Civil Rights Acts by the act of a state primary canvassing board, in violation of state law, in refusing to issue to him a certificate of nomination for a state office, although he had received a sufficient number of votes to entitle him thereto. The court held (Justices Douglas and Murphy dissenting) that since the allegations of the complaint failed to show an intentional or purposeful discrimination in the administration of state law they were insufficient to raise any issue of equal protection of the laws. The court thus found it "unnecessary to consider whether the action by the state board of which petitioner complains is state action within the meaning of the Fourteenth Amendment." In a concurring opinion Mr. Justice Frankfurter expressed the view that *Barney v. New York*, supra, was controlling and said that he was "unable to grasp the principle on which the state can here be said to deny the plaintiff the equal protection of the laws of the state when the foundation of his claim is that the board has disobeyed the authentic command of the state." He continued: "I am clear, therefore, that the action of the canvassing board taken, as the

plaintiff himself acknowledges, in defiance of the duty of that board under Illinois law, cannot be deemed the action of the state, certainly not until the highest court of the state confirms such action and thereby makes it the law of the state."

### WILLIAMS v. UNITED STATES.

Supreme Court of the United States, 1951.  
341 U. S. 97, 95 L. ed. 774, 71 Sup. Ct. 576.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether a special police officer who in his official capacity subjects a person suspected of crime to force and violence in order to obtain a confession may be prosecuted under § 20 of the Criminal Code, 18 U. S. C. (1946 ed.) § 52.

Section 20 provides in pertinent part:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, \* \* \*, shall be fined not more than \$1,000, or imprisoned not more than one year, or both."

The facts are these: The Lindsley Lumber Co. suffered numerous thefts and hired petitioner, who operated a detective agency, to ascertain the identity of the thieves. Petitioner held a special police officer's card issued by the City of Miami, Florida and had taken an oath and qualified as a special police officer. Petitioner and others over a period of three days took four men to a paint shack on the company's premises and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed. One Ford, a policeman, was sent by his superior to lend authority to the proceedings. And petitioner, who committed the assaults, went about flashing his badge.

The indictment charged among other things that petitioner acting under color of law used force to make each victim confess to his guilt and implicate others, and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the state. Petitioner was found guilty by a jury under instructions which conformed with the rulings of the Court in *Screws v. United States*, 325 U. S. 91. The

Court of Appeals affirmed. 179 F. 2d 656. The case, which is a companion to No. 26, *United States v. Williams*, 341 U. S. 70, and No. 134, *United States v. Williams*, decided this day, 341 U. S. 58, is here on certiorari.

We think it clear that petitioner was acting "under color" of law within the meaning of § 20, or at least that the jury could properly so find. We interpreted this phrase of § 20 in *United States v. Classic*, 313 U. S. 299, 326, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." And see *Screws v. United States*, *supra*. It is common practice, as we noted in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 331 U. S. 416, 429, for private guards or detectives to be vested with policemen's powers. We know from the record that that is the policy of Miami, Florida. Moreover, this was an investigation conducted under the aegis of the state, as evidenced by the fact that a regular police officer was detailed to attend it. We need go no further to conclude that the lower court to whom we give deference on local law matters, see *Gardner v. New Jersey*, 329 U. S. 565, 583, was correct in holding that petitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person. In any event the charge to the jury drew the line between official and unofficial conduct which we explored in *Screws v. United States*, *supra*, and gave petitioner all of the protection which "color of" law as used in § 20 offers.

The main contention is that the application of § 20 so as to sustain a conviction for obtaining a confession by use of force and violence is unconstitutional. The argument is the one that a clear majority of the Court rejected in *Screws v. United States*, and runs as follows:

Criminal statutes must have an ascertainable standard of guilt or they fall for vagueness. See *United States v. L. Cohen Grocery Co.*, 255 U. S. 81; *Winters v. New York*, 333 U. S. 507. Section 20, it is argued, lacks the necessary specificity when rights under the Due Process Clause of the Fourteenth Amendment are involved. We are pointed to the course of decisions by this Court under the Due Process Clause as proof of the vague and fluid standard for "rights, privileges, or immunities secured or protected by the Constitution" as used in § 20. We are referred to decisions where we have been closely divided on whether state action violated due process. More specifically we are cited many instances where the Court has been conspicuously in disagreement on the illegal character of confessions under the Due Process Clause. If the Court cannot agree as to what confessions violate the Fourteenth Amendment, how can one who risks criminal

prosecutions for his acts be sure of the standard? Thus it is sought to show that police officers such as petitioner walk on ground far too treacherous for criminal responsibility.

Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional. Conversely, as we held in *Screws v. United States*, a close construction will often save an act from vagueness that is fatal. The present case is as good an illustration as any. It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb screw—the ancient methods of securing evidence by torture \* \* \* were used to compel the confession. Some day the application of § 20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented. There may be a similar doubt when an officer is tried under § 20 for beating a man to death. That was a doubt stirred in the *Screws Case*; and it was the reason we held that the purpose must be plain, the deprivation of the constitutional right willful. But where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well established constitutional rights which every citizen enjoys. Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees. Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific.

An effort, however, is made to free Williams by an extremely technical construction of the indictment and charge, so as to condemn the application of § 20 on the grounds of vagueness.

The indictment charged that petitioners deprived designated persons of rights and privileges secured to them by the Fourteenth Amendment. These deprivations were defined in the indictment to include "illegal" assault and battery. But the meaning of these rights in the context of the indictment was plain, viz. *immunity from the use of force and violence to obtain a confession*. Thus count 2 of the indictment charges that the Fourteenth Amendment rights of one Purnell were violated in the following respects:

"\* \* \* the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida; that is to say, on or about the 28th day of March, 1947, the defendants arrested and detained and caused to be arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co., at or near 3810 N. W. 17th Avenue, in said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and there illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr., in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confession of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal property, alleged to be the property of the said Lindsley Lumber Co., and for the purpose of imposing illegal summary punishment upon the said Frank J. Purnell, Jr."

The trial judge in his charge to the jury summarized Count 2 as meaning that the defendants beat Purnell "for the purpose of forcing him to make a confession and for the purpose of imposing illegal summary punishment upon him." It further made clear in its charge that the defendants were "not here on trial for a violation of any law of the State of Florida for assault" nor "for assault under any laws of the United States." There cannot be the slightest doubt from the reading of the indictment and charge as a whole that the defendants were charged with and tried for one of the most brutal deprivations of constitutional rights that can be imagined. It therefore strains at technicalities to say that any issue of vagueness of § 20 as construed and applied is present in the case. Our concern is to see that substantial justice is done, not to search the record for possible errors which will defeat the great purpose of Congress in enacting § 20.

Affirmed.

[MR. JUSTICE BLACK dissented. MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE MINTON dissented for the reasons set forth in the dissent in *Screws v. United States*.]

## NOTES

1. As indicated in the above opinion, the proposition that acts of a state officer in violation of a state law may violate the Fourteenth Amendment and thus subject the officer to criminal prosecution and punishment in the federal courts had previously been reconsidered and reaffirmed in *Screws v. United States*, 325 U. S. 91, 89 L. ed. 1495, 65 Sup. Ct. 1031, 162 A. L. R. 1330 (1945), where state police officers were convicted of violating the same statute (§ 20 of the Criminal Code, now 18 U. S. C. § 242; F. C. A. 18 § 242) as was before the court in the principal case. Screws, sheriff in a Georgia county, aided by a deputy and a policeman, arrested Hall, a Negro, for the alleged theft of a tire. There was evidence that Screws had a grudge against Hall and threatened to "get" him. The three officers handcuffed the prisoner, took him from his home at night to the courthouse square and there began beating him with their fists and with a solid-bar blackjack until he became unconscious. He was then dragged feet first through the courthouse yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital, where he died within the hour and without regaining consciousness. The indictment charged that the three officers, acting under color of the laws of Georgia, "willfully" caused Hall to be deprived of rights, privileges, or immunities secured to him by the Fourteenth Amendment: the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia. Although the Supreme Court reversed and remanded for a new trial, a majority (speaking through Mr. Justice Douglas, with Mr. Justice Rutledge concurring specially in the result) agreed that the federal statute could validly be applied to fact situations of the type presented. In answer to the contention that the statute was unconstitutional because of vagueness in the standard of guilt it set up, the court held that the word "willfully" made the statute sufficiently specific by requiring that a defendant convicted under it must be shown to have had a specific intent to deprive a person of a federal constitutional right. Since this issue was not submitted to the jury, a new trial was ordered (at which, incidentally, Screws was acquitted). On the question of state action the court held that defendants acted under "color" of law in making the arrest of Hall and assaulting him. Mr. Justice Douglas said: "Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the state in fact authorized, the words 'under color of any law' were hardly apt words to express the idea." Mr. Justice Murphy, dissenting, thought that the judgment should be affirmed, since evidence of defendants' guilt was clear and the statute unmistakably outlaws such lawless action by state officers. Justices Roberts, Frankfurter and Jackson, dissenting, thought that the statute should be confined to attempted deprivations of federal rights by state law and not extended to cover clear violations of state law by its officials. They said: "Of course the petitioners are punishable. The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime can be made the basis of a federal prosecution." The several opinions are analyzed and criticized in Cohen, *The Screws Case: Federal Protection of Negro Rights*, 46 Col. L. Rev. 94 (1946), and Comment, 44 Mich. L. Rev. 814 (1946). For a general discussion see Hale, *Unconstitutional Acts as Federal Crimes*, 60 Harv. L. Rev. 65 (1946).

2. In *United States v. Williams*, 341 U. S. 70, 95 L. ed. 758, 71 Sup. Ct. 581 (1951), a companion case to the principal case, the same defendant, two of his employees and the police officer detailed to assist him were convicted in a federal court for violation of § 19 of the Criminal Code (now 18 U. S. C. § 241; F. C. A. 18 § 241), which prohibits a conspiracy to injure a citizen in the free enjoyment of any right or privilege secured to him by the Constitution. Mr. Justice Frankfurter, announcing the judgment of the court in an opinion in which Chief Justice Vinson and Justices Jackson and Minton joined, took the view that the conspiracy provision covers only conduct which interferes with rights which arise from the relation of the victim and the federal government, and not to interference by state officers with rights which the federal government merely guarantees from abridgment by the states. Mr. Justice Black concurred in the result and Justices Douglas, Reed, Burton and Clark dissented. The dissenting opinion said: "One would indeed have to strain hard at words to find any difference of substance between 'any right or privilege secured' by the Constitution or laws of the United States (§ 19) and 'any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States' (§ 20). If § 20 embraces a broader range of rights than § 19, it must be because it includes 'immunities' as well as 'rights' and 'privileges' and 'protects' them as well as 'secures' them. When no major difference between §§ 19 and 20 is apparent from the words themselves, it is strange to hear it said that though § 20 extends to rights guaranteed against state action by the Fourteenth Amendment, § 19 is limited to rights which the federal government can secure against invasion by private persons. The division of powers between state and nation is so inherent in our republican form of government and so well established throughout our history that if Congress had desired to draw a distinction along that line, it is hard to imagine that it would not have made its purpose clear in the language used." Since Mr. Justice Black's concurrence in the result was on the ground that a prior conviction of one of the defendants and an acquittal of the others of the substantive charge under § 20 barred their further prosecution on the conspiracy charge under § 19, it is clear that the eight justices who expressed themselves were equally divided on the issue of the extent of the protection afforded by the conspiracy provision in fact situations of this type.

3. For the view that inaction by state officers constitutes a violation of the Fourteenth Amendment, see *Catlette v. United States*, 132 F. (2d) 902 (C. C. A. 4th 1943), where the conviction of a sheriff was affirmed for failing to protect persons from mob violence in the exercise of their constitutional rights, the court saying that "culpable official state inaction may constitute a denial of equal protection." This proposition affords the primary constitutional underpinning for the proposed federal Anti-Lynching Act, which would impose criminal and civil liability upon state officers for their failure to prevent or punish lynching. See Note, *Constitutionality of Proposed Federal Anti-Lynching Legislation*, 34 Va. L. Rev. 944 (1948); Comment, *Federal Power to Prosecute Violence Against Minority Groups*, 57 Yale L. J. 855 (1948).

4. Generally speaking, the federal Civil Rights Acts have not played an effective part in the enforcement of the prohibitions of the Fourteenth Amendment. The usual recourse of the individual has been to defend in court state action alleged to offend its guarantees or, where possible, to prevent such action through the use of the injunction. Only in recent years have more concerted efforts been made by federal authorities to afford protection by intervening in situations where state and local authorities have seemed unable or unwilling to take effective action. In 1939 a Civil Rights Section was established in the Criminal Division of the Department of Justice to "direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals." For a review of this program,

see Carr, *Federal Protection of Civil Rights* (1947). See also, Putzel, *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. of Pa. L. Rev. 439 (1951); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952). The arguments in support of the proposal that the national government should assume leadership in a program to secure better enforcement of civil rights are carefully marshalled in the report of the President's Committee on Civil Rights. See, *To Secure These Rights—The Report of the President's Committee on Civil Rights* (U. S. Government Printing Office, 1947). Those opposed to such a course of action, whether in the form of additional legislation or otherwise, argue that under our federal system the states must continue to assume primary responsibility for the enforcement of civil rights and contend that the hostility of communities where violations occur often defeats attempted federal law enforcement.

### COLLINS v. HARDYMAN.

Supreme Court of the United States, 1951.  
341 U. S. 651, 95 L. ed. 1253, 71 Sup. Ct. 937.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This controversy arises under 8 U. S. C. § 47(3) [F. C. A. 8 § 47 (3)], which provides civil remedies for certain conspiracies. A motion to dismiss the amended complaint raises the issue of its sufficiency and, of course, requires us to accept its well-pleaded facts as the hypothesis for decision.

Its essential allegations are that plaintiffs are citizens of the United States, residents of California, and members or officers of a voluntary association or political club organized for the purpose of participating in the election of officers of the United States, petitioning the national government for redress of grievances, and engaging in public meetings for the discussion of national public issues. It planned a public meeting for November 14, 1947, on the subject, "The Cominform and the Marshall Plan," at which it was intended to adopt a resolution opposing said Marshall Plan, to be forwarded, by way of a petition for the redress of grievances, to appropriate federal officials.

The conspiracy charged as being within the Act is that defendants, with knowledge of the meeting and its purposes, entered into an agreement to deprive the plaintiffs, "as citizens of the United States, of the privileges and immunities as citizens of the United States, of the rights peaceably to assemble for the purpose of discussing and communicating upon national public issues \* \* \*." And further, "to deprive the plaintiffs as well as the members of the said club as citizens of the United States, of equal privileges and immunities under the laws of the United States \* \* \*." This is amplified by allegations that defendants knew of many public meetings in the locality, at which resolutions were adopted by groups with whose opinions defendants agreed, and with which defendants did not interfere or conspire to interfere. "With respect to the meeting aforesaid on November 14, 1947, however,

the defendants conspired to interfere with said meeting for the reason that the defendants opposed the views of the plaintiffs \* \* \*.”  
\* \* \*

The complaint then separately sets out the overt acts of injury and damage relied upon to meet the requirements of the Act. To carry out the conspiracy, it is alleged that defendants proceeded to the meeting place and, by force and threats of force, did assault and intimidate plaintiffs and those present at the meeting and thereby broke up the meeting, thus interfering with the right of the plaintiffs to petition the Government for redress of grievances. Both compensatory and punitive damages are demanded.

It is averred that the cause of action arises under the statute cited and under the Constitution of the United States. But apparently the draftsman was scrupulously cautious not to allege that it arose under the Fourteenth Amendment, or that defendants had conspired to deprive plaintiffs of rights secured by that Amendment, thus seeking to avoid the effect of earlier decisions of this Court in Fourteenth Amendment cases.

The complaint makes no claim that the conspiracy or the overt acts involved any action by state officials, or that defendants even pretended to act under color of state law. It is not shown that defendants had or claimed any protection or immunity from the law of the State, or that they in fact enjoyed such because of any act or omission by state authorities. Indeed, the trial court found that the acts alleged are punishable under the laws of California relating to disturbance of the peace, assault, and trespass, and are also civilly actionable.

The District Judge held that the statute does not and cannot constitutionally afford redress for invasions of civil rights at the hands of individuals, but can only be applied to injuries to civil rights by persons acting pursuant to or under color of state law. In reversing the District Court's dismissal of the complaint, the Court of Appeals for the Ninth Circuit held otherwise, one judge dissenting. The Court of Appeals for the Eighth Circuit, in *Love v. Chandler*, 124 F. (2d) 785, has ruled in accord with the District Judge and the dissenting Court of Appeals Judge here. To resolve the conflict, we granted certiorari.

This statutory provision has long been dormant. It was introduced into the federal statutes by the Act of April 20, 1871, entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." The Act was among the last of the reconstruction legislation to be based on the "conquered province" theory which prevailed in Congress for a period following the Civil War. This statute, without separability provisions, established the civil liability with which we are here concerned as well as other civil liabilities, together with parallel criminal liabilities. It also provided that unlawful combinations and conspiracies named in the Act might be deemed rebellions, and authorized the President to employ the

militia to suppress them. The President was also authorized to suspend the privilege of the writ of habeas corpus. It prohibited any person from being a federal grand or petit juror in any case arising under the Act unless he took and subscribed an oath in open court "that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy." Heavy penalties and liabilities were laid upon any person who, with knowledge of such conspiracies, aided them or failed to do what he could to suppress them.

The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction.

The provision establishing criminal conspiracies in language indistinguishable from that used to describe civil conspiracies came to judgment in *United States v. Harris*, 106 U. S. 629. It was held unconstitutional. This decision was in harmony with that of other important decisions during that period by a Court, every member of which had been appointed by Presidents Lincoln, Grant, Hayes, Garfield or Arthur—all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system.

While we have not been in agreement as to the interpretation and application of some of the post-Civil War legislation, the Court recently unanimously declared, through the Chief Justice:

"Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." \* \* \*

It is apparent that, if this complaint meets the requirements of this Act, it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights. The latter question was long ago decided adversely to the plaintiffs. *Baldwin v. Franks*, 120 U. S. 678. Before we embark upon such a constitutional inquiry, it is necessary to satisfy ourselves that the attempt to allege a cause of action within the purview of the statute has been successful.

The section under which this action is brought falls into two divisions. The forepart defines conspiracies that may become the basis of liability, and the latter portion defines overt acts necessary to consummate the

conspiracy as an actionable wrong. While a mere unlawful agreement or conspiracy may be made a federal crime, as it was at common law, this statute does not make the mere agreement or understanding for concerted action which constitutes the forbidden conspiracy an actionable wrong unless it matures into some action that inflicts injury. That, we think, is the significance of the second division of the section.

The provision with reference to the overt act will bear repeating, with emphasis supplied: "\* \* \* [I]n any case of *conspiracy set forth in this section*, if one or more persons engaged therein do, or cause to be done, *any act in furtherance of the object of such conspiracy*, whereby another is *injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States*, the party so injured or deprived may have an action for the recovery of damages \* \* \*."

In the light of the dictum in *United States v. Cruikshank*, 92 U. S. 542, 552, we assume, without deciding, that the facts pleaded show that defendants did deprive plaintiffs "of having and exercising" a federal right which, provided the defendants were engaged in a "conspiracy set forth in this section," would bring the case within the Act.

The "conspiracy" required is differently stated from the required overt act and we think the difference is not accidental but significant. Its essentials, with emphasis supplied, are that two or more persons must conspire (1) for the purpose of *depriving* any person or class of persons of the *equal protection of the laws, or of equal privileges and immunities under the law*; or (2) for the purpose of preventing or hindering the constituted authorities from giving or securing to all persons the equal protection of the laws; or (3) to prevent by force, intimidation, or threat, any citizen entitled to vote from giving his support or advocacy in a legal manner toward election of an elector for President or a member of Congress; or (4) to injure any citizen in person or property on account of such support or advocacy. There is no claim that any allegation brings this case within the provisions that we have numbered (2), (3), and (4), so we may eliminate any consideration of those categories. The complaint is within the statute only if it alleges a conspiracy of the first described class. It is apparent that this part of the Act defines conspiracies of a very limited character. They must, we repeat, be "for the purpose of *depriving* \* \* \* of the *equal protection of the laws, or of equal privileges and immunities under the laws*." (Italics supplied.)

Passing the argument, fully developed in the Civil Rights Cases, that an individual or group of individuals not in office cannot *deprive* anybody of constitutional rights, though they may invade or violate those rights, it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of "equal protection of the laws," or of "equal privileges and immunities under the laws." That accords with the purpose of the Act to put the lately

freed Negro on an equal footing before the law with his former master. The Act apparently deemed that adequate and went no further.

What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by the law, or their equality of privileges and immunities under the law. There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it. The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of "equal protection" or of "equal privileges and immunities" than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob.

We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws. Indeed, the post Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so. It is estimated to have had a membership of around 550,000, and thus to have included "nearly the entire adult male white population of the South." It may well be that a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the "carpetbag" and "scalawag" governments of the day, was able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication, in view of the then disparity of position, education and opportunity between them and those who made up the Ku Klux Klan. We do not know. But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens. California courts are open to plaintiffs and its laws offer redress for their injury and vindication for their rights.

We say nothing of the power of Congress to authorize such civil actions as respondents have commenced or otherwise to redress such grievances as they assert. We think that Congress has not, in the narrow class of conspiracies defined by this statute, included the conspiracy charged here. We therefore reach no constitutional questions. The facts alleged fall short of a conspiracy to alter, impair or deny equality

of rights under the law, though they do show a lawless invasion of rights for which there are remedies in the law of California. It is not for this Court to compete with Congress or attempt to replace it as the Nation's law-making body.

The judgment of the Court of Appeals is reversed.      Reversed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE BURTON, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur, dissenting.

I cannot agree that the respondents in their complaint have failed to state a cause of action under R. S. § 1980(3), 8 U. S. C. § 47(3) [F. C. A. 8 § 47(3)].

The right alleged to have been violated is the right to petition the Federal Government for a redress of grievances. This right is expressly recognized by the First Amendment and this Court has said that "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U. S. 542, 552, and see *In re Quarles and Butler*, 158 U. S. 532, 535. The source of the right in this case is not the Fourteenth Amendment. The complaint alleges that petitioners "knowingly" did not interfere with the "many public meetings" whose objectives they agreed with, but that they did conspire to break up respondents' meeting because petitioners were opposed to respondents' views, which were expected to be there expressed. Such conduct does not differ materially from the specific conspiracies which the Court recognizes that the statute was intended to reach.

The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R. S. § 1980(3) speaks of "two or more persons in any State or Territory" conspiring. That clause is not limited to state officials. Still more obviously, where the section speaks of persons going "in disguise on the highway \* \* \* for the purpose of depriving \* \* \* any person or class of persons of the equal protection of the laws," it certainly does not limit its reference to actions of that kind by state officials. When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms. In fact, R. S. § 1980(3) originally was § 2 of the Act of April 20, 1871, and § 1 of that same Act said "That any person who, *under color of any law*, statute, ordinance, regulation, custom, or usage of any State, shall subject \* \* \* any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall \* \* \* be liable to the party injured \* \* \* ." (Emphasis added.) 17 Stat. 13.

Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridg-

ment of federally created constitutional rights. It seems to me that Congress has done just this in R. S. § 1980(3). This is not inconsistent with the principle underlying the Fourteenth Amendment. That amendment prohibits the respective states from making laws abridging the privileges or immunities of citizens of the United States or denying to any person within the jurisdiction of a state the equal protection of the laws. Cases holding that those clauses are directed only at state action are not authority for the contention that Congress may not pass laws supporting rights which exist apart from the Fourteenth Amendment.

Accordingly, I would affirm the judgment of the Court of Appeals.

#### NOTE

1. The federal cases involving liability in damages under 8 U. S. C. § 47; F. C. A. § 47 for conspiring to deprive a person of his civil rights are collected in 95 L. ed. 1261 (1951).

#### NORRIS v. ALABAMA.

Supreme Court of the United States, 1935.  
294 U. S. 587, 79 L. ed. 1074, 55 Sup. Ct. 579.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Petitioner, Clarence Norris, is one of nine negro boys who were indicted in March, 1931, in Jackson County, Alabama, for the crime of rape. On being brought to trial in that county, eight were convicted. The Supreme Court of Alabama reversed the conviction of one of these and affirmed that of seven, including Norris. This Court reversed the judgments of conviction upon the ground that the defendants had been denied due process of law in that the trial court had failed in the light of the circumstances disclosed, and of the inability of the defendants at that time to obtain counsel, to make an effective appointment of counsel to aid them in preparing and presenting their defense. *Powell v. Alabama*, 287 U. S. 45.

After the remand, a motion for change of venue was granted and the cases were transferred to Morgan County. Norris was brought to trial in November, 1933. At the outset, a motion was made on his behalf to quash the indictment upon the ground of the exclusion of negroes from juries in Jackson County where the indictment was found. A motion was also made to quash the trial venire in Morgan County upon the ground of the exclusion of negroes from juries in that county. In relation to each county, the charge was of long-continued, systematic, and arbitrary exclusion of qualified negro citizens from service on juries, solely because of their race and color, in violation of the Constitution of the United States. The state joined issue on this charge and after hearing the evidence, which we shall presently review, the trial judge denied both motions, and exception was taken. The trial then

proceeded and resulted in the conviction of Norris who was sentenced to death. On appeal, the Supreme Court of the state considered and decided the federal question which Norris had raised and affirmed the judgment. We grant a writ of certiorari. 293 U. S. 552.

First. There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized, by the Supreme Court of the state. Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter v. Texas*, 177 U. S. 442, 447, in relation to exclusion from service on grand juries: "Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U. S. 303; *Neal v. Delaware*, 103 U. S. 370, 397; *Gibson v. Mississippi*, 162 U. S. 565." This statement was repeated in the same terms in *Rogers v. Alabama*, 192 U. S. 226, 231, and again in *Martin v. Texas*, 200 U. S. 316, 319. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. *Strauder v. West Virginia*, *supra*; *Martin v. Texas*, *supra*. And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination. *Neal v. Delaware*, *supra*; *Carter v. Texas*, *supra*. Compare *Virginia v. Rives*, 100 U. S. 313, 322, 323; *In re Wood*, 140 U. S. 278, 285; *Thomas v. Texas*, 212 U. S. 278, 282, 283.

The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. \* \* \*

Second. *The evidence on the motion to quash the indictment.* In 1930, the total population of Jackson County, where the indictment was found, was 36,881, of whom 2,688 were negroes. The male population over twenty-one years of age numbered 8,801, and of these 666 were negroes.

The qualifications of jurors were thus prescribed by the state statute (Alabama Code 1923, § 8603): "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box." See Gen. Acts Alabama 1931, No. 47, p. 59, § 14.

Defendant adduced evidence to support the charge of unconstitutional discrimination in the actual administration of the statute in Jackson County. The testimony, as the state court said, tended to show that "in a long number of years no negro had been called for jury service in that county." It appeared that no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials. The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury in Jackson County. The court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect. One of the latter, who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had "never known of a single instance where any negro sat on any grand or petit jury in the entire history of that county."

That testimony in itself made out a prima facie case of the denial of the equal protection which the Constitution guarantees. See *Neal v. Delaware*, supra. The case thus made was supplemented by direct testimony that specified negroes, thirty or more in number, were qualified for jury service. Among these were negroes who were members of school boards, or trustees, of colored schools, and property owners and householders. It also appeared that negroes from that county had been called for jury service in the federal court. Several of those who were thus described as qualified were witnesses. While there was testimony which cast doubt upon the qualifications of some of the negroes who had been named, and there was also general testimony by the editor of a local newspaper who gave his opinion as to the lack of "sound judgment" of the "good negroes" in Jackson County, we think that the definite testimony as to the actual qualifications of individual

negroes, which was not met by any testimony equally direct, showed that there were negroes in Jackson County qualified for jury service.

The question arose whether names of negroes were in fact on the jury roll. The books containing the jury roll for Jackson County for the year 1930-31 were produced. They were produced from the custody of a member of the jury commission which, in 1931, had succeeded the commission which had made up the jury roll from which the grand jury in question had been drawn. On the pages of this roll appeared the names of six negroes. They were entered, respectively, at the end of the precinct lists which were alphabetically arranged. The genuineness of these entries was disputed. It appeared that after the jury roll in question had been made up, and after the new jury commission had taken office, one of the new commissioners directed the new clerk to draw lines after the names which had been placed on the roll by the preceding commission. These lines, on the pages under consideration, were red lines, and the clerk of the old commission testified that they were not put in by him. The entries made by the new clerk, for the new jury roll, were below these lines.

The names of the six negroes were in each instance written immediately above the red lines. An expert of long experience testified that these names were superimposed upon the red lines, that is, that they were written after the lines had been drawn. The expert was not cross-examined and no testimony was introduced to contradict him. In denying the motion to quash, the trial judge expressed the view that he would not "be authorized to presume that somebody had committed a crime" or to presume that the jury board "had been unfaithful to their duties and allowed the books to be tampered with." His conclusion was that names of negroes were on the jury roll.

We think that the evidence did not justify that conclusion. The Supreme Court of the state did not sustain it. That court observed that the charge that the names of negroes were fraudulently placed on the roll did not involve any member of the jury board, and that the charge "was, by implication at least, laid at the door of the clerk of the board." The court, reaching its decision irrespective of that question, treated that phase of the matter as "wholly immaterial" and hence passed it by "without any expression of opinion thereon."

The state court rested its decision upon the ground that even if it were assumed that there was no name of a negro on the jury roll, it was not established that race or color caused the omission. The court pointed out that the statute fixed a high standard of qualifications for jurors (*Green v. State*, 73 Ala. 26; *State v. Curtis*, 210 Ala. 1, 97 So. 291) and that the jury commission was vested with a wide discretion. The court adverted to the fact that more white citizens possessing age qualifications had been omitted from the jury roll than the entire negro population of the county, and regarded the testimony as being to the

effect that "the matter of race, color, politics, religion or fraternal affiliations" had not been discussed by the commission and had not entered into their consideration, and that no one had been excluded because of race or color. \* \* \*

We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment on that ground should have been granted.

Third. *The evidence on the motion to quash the trial venire.* The population of Morgan County, where the trial was had, was larger than that of Jackson County, and the proportion of negroes was much greater. The total population of Morgan County in 1930 was 46,176, and of this number 8,311 were negroes.

Within the memory of witnesses, long resident there, no negro had ever served on a jury in that county or had been called for such service. Some of these witnesses were over fifty years of age and had always lived in Morgan County. Their testimony was not contradicted. A clerk of the circuit court, who had resided in the county for thirty years, and who had been in office for over four years, testified that during his official term approximately 2,500 persons had been called for jury service and that not one of them was a negro; that he did not recall "ever seeing any single person of the colored race serve on any jury in Morgan County."

There was abundant evidence that there were a large number of negroes in the county who were qualified for jury service. Men of intelligence, some of whom were college graduates, testified to long lists (said to contain nearly 200 names) of such qualified negroes, including many business men, owners of real property and householders. When defendant's counsel proposed to call many additional witnesses in order to adduce further proof of qualifications of negroes for jury service, the trial judge limited the testimony, holding that the evidence was cumulative.

We find no warrant for a conclusion that the names of any of the negroes as to whom this testimony was given, or of any other negroes, were placed on the jury rolls. No such names were identified. The evidence that for many years no negro had been called for jury service itself tended to show the absence of the names of negroes from the jury rolls, and the state made no effort to prove their presence. The trial judge limited the defendant's proof "to the present year, the

present jury roll." The sheriff of the county, called as a witness for defendants, scanned the jury roll and after "looking over every single name on that jury roll, from A to Z," was unable to point out "any single negro on it."

For this long-continued, unvarying, and wholesale exclusion of negroes from jury service we find no justification consistent with the constitutional mandate. We have carefully examined the testimony of the jury commissioners upon which the state court based its decision.

\* \* \*

We think that this evidence failed to rebut the strong *prima facie* case which defendant had made. That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement.

\* \* \*

We are concerned only with the federal question which we have discussed, and in view of the denial of the federal right suitably asserted, the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE McREYNOLDS did not hear the argument and took no part in the consideration and decision of this case.

#### NOTES

1. Beginning with *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664 (1880) and *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676 (1880) many cases have held that the state exclusion of Negroes from grand and petit juries solely because of their race denied Negro defendants in criminal prosecutions the equal protection of the laws, regardless of whether the discrimination was embodied in a statute or resulted from the administrative practices of state officials charged with the selection of juries. On the other hand, in a number of cases, beginning with *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667 (1880), the court has held that a defendant in a criminal case has no constitutional right to be indicted or tried by a jury composed in part of members of his race. Thus a Negro defendant is not entitled to have Negroes on the jury but is only protected against discrimination in the selection thereof. The significance of the principal case (the second "Scottsboro case") is that here for the first time the court took cognizance of the procedure by which the juries which had indicted and tried the defendants had been chosen, convinced itself upon investigation that Negroes had been barred from them for racial reasons, and held that this *de facto* exclusion was equivalent to exclusion by law. The court thus activated the principle that the denial of equal protection by the exclusion of Negroes from juries may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. Other cases decided since *Norris v. Alabama* in which the evidence was held sufficient to show systematic and intentional discrimination against Negroes in the selection of grand or petit juries: *Hale v. Kentucky*,

303 U. S. 613, 82 L. ed. 1050, 58 Sup. Ct. 753 (1938); *Pierre v. Louisiana*, 306 U. S. 354, 83 L. ed. 757, 59 Sup. Ct. 536 (1939); *Smith v. Texas*, 311 U. S. 128, 85 L. ed. 84, 61 Sup. Ct. 164 (1940); *Hill v. Texas*, 316 U. S. 400, 86 L. ed. 1559, 62 Sup. Ct. 1159 (1942); *Patton v. Mississippi*, 332 U. S. 463, 92 L. ed. 76, 68 Sup. Ct. 184, 1 A. L. R. (2d) 1286 (1947); *Cassell v. Texas*, 339 U. S. 282, 94 L. ed. 839, 70 Sup. Ct. 629 (1950); *Shepherd v. Florida*, 341 U. S. 50, 95 L. ed. 740, 71 Sup. Ct. 549 (1951); *Avery v. Georgia*, 345 U. S. 559, 97 L. ed. 1244, 73 Sup. Ct. 891 (1953). While a defendant must offer proof of such intentional discrimination, it was early established that his constitutional rights are violated where the court refuses to receive or hear any evidence to this effect. *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567 (1881); *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. 687 (1900); *Martin v. Texas*, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. 338 (1906). Cases involving racial discrimination in the selection of juries are collected and discussed in the annotations in 94 L. ed. 856 (1950) and 97 L. ed. 1249 (1953).

2. In *Akins v. Texas*, 325 U. S. 398, 89 L. ed. 1692, 65 Sup. Ct. 1276 (1945) the court held that fairness in the selection of a jury does not require proportional representation of races thereon and that racial discrimination in the selection of the grand jury which indicted defendant was not established by showing that the grand jury panel of sixteen contained the name of only one Negro, who was among the twelve chosen to serve. Chief Justice Stone and Justices Black and Murphy dissented.

In *Brown v. Allen*, 344 U. S. 443, 97 L. ed. 469, 73 Sup. Ct. 397 (1953) the court found no violation of the equal protection clause in the use, nondiscriminatory as to race, of property tax lists for selection of grand and petit jurors, even though that practice resulted in the appearance on jury panels of fewer Negroes than whites, having regard for their proportion of the population. The court said: "Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use required a conclusion of unconstitutionality." Justices Black and Douglas dissented.

In selecting jurors for the trial of a Negro in a state court on a charge of rape, the drawings were made from a box containing white tickets, bearing the names of white veniremen, and colored tickets bearing the names of colored veniremen. Although the judge who picked out the tickets denied any discrimination, not a single Negro was in the panel, though many were available. Reversing the affirmation of a conviction by the highest state court, the Supreme Court held that the use of separately colored tickets constituted prima facie evidence of discrimination and that the State had not met the burden of overcoming this evidence. *Avery v. Georgia*, 345 U. S. 559, 97 L. ed. 1244, 73 Sup. Ct. 891 (1953).

3. The constitutional guaranty of equal protection of the laws was held to have been violated where, in the conviction of a person of Mexican descent of the crime of murder, it appeared that persons of similar ancestry had been systematically excluded from service as jury commissioners, grand jurors, and petit jurors, in the county in which he was convicted, although there were such persons fully qualified under the law to serve. The court, through Chief Justice Warren, said: "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." The court said further that no question of the rejected theory of "proportional representation" of component ethnic groups was

involved, as here the defendant's only claim was the right to be indicted and tried by juries from which all persons of his national origin or descent were not systematically excluded. *Hernandez v. Texas*, 347 U. S. 475, 98 L. ed. 866, 74 Sup. Ct. 667 (1954).

4. While specially constituted or "blue ribbon" juries are not a new device, their value has been the subject of much controversy among commentators and their constitutionality has recently been attacked in the Supreme Court. In *Fay v. New York*, 332 U. S. 261, 91 L. ed. 2043, 67 Sup. Ct. 1613 (1947) defendants, union leaders convicted of extortion, alleged that application of the special jury statute resulted in a panel from which laborers, operatives, craftsmen, foremen, service employees and women were systematically, intentionally and deliberately excluded, and that the special panel so composed had shown greater inclination to convict than the general panel. In a five-to-four decision, the court held that there was nothing in the standards New York had prescribed which made the statute unconstitutional on its face and that there was no clear showing that its administrative application had resulted in a denial of equal protection or due process of law. Justices Murphy, Black, Douglas and Rutledge dissented, contending that the "blue ribbon" jury "denies the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community" and "forces upon him a jury drawn from a panel chosen in a manner which tends to obliterate the representative basis of the jury." In *Moore v. New York*, 333 U. S. 565, 92 L. ed. 881, 68 Sup. Ct. 705 (1948) the constitutionality of the New York statute was again upheld on the authority of the *Fay* case, the same justices dissenting.

5. In *Frazier v. United States*, 335 U. S. 497, 93 L. ed. 187, 69 Sup. Ct. 201 (1948) it was held that a defendant convicted in a federal court of the District of Columbia of violating the Harrison Narcotics Act was not denied trial "by an impartial jury" guaranteed by the Sixth Amendment in that the jury was comprised entirely of government employees, and that one of the jurors and the wife of another were employed in the Treasury Department (though not in the Narcotics Bureau) which is charged with enforcing the act. Justices Jackson, Frankfurter, Douglas and Murphy dissented on the ground that a jury, every member of which is in the hire of one of the litigants, lacks the impartiality upon which the Supreme Court in exercising its supervisory powers over federal courts should insist.

*Dennis v. United States*, 339 U. S. 162, 94 L. ed. 734, 70 Sup. Ct. 519 (1950) involved a criminal prosecution in the District of Columbia against a member of the Communist Party for contempt of the House Committee on Un-American Activities. Defendant, on voir dire, challenged for cause prospective jurors who were employed by the federal government on the ground that bias should be implied as a matter of law, since these employees were subject to the President's "Loyalty Order" and were thus liable to discharge upon reasonable grounds for belief that they were disloyal to the government. The refusal of the trial court to sustain this challenge was alleged to deprive defendant of an impartial jury, as guaranteed by the Sixth Amendment. The Supreme Court repudiated this contention, refusing to impute bias to the jurors solely by reason of their employment by the government in the absence of any evidence showing actual bias. Justices Black and Frankfurter dissented and Justices Douglas and Clark did not participate.

## PLESSY v. FERGUSON.

Supreme Court of the United States, 1896.  
163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. 1138.

[A statute of Louisiana, Acts of 1890, No. 111, required railways carrying passengers in the state to provide "equal but separate accommodations for the white and colored races," making it an offense punishable by fine for any person to insist upon going into space assigned to persons of the other race. Plessy being charged before Ferguson, judge of the Criminal Court for the parish of Orleans, for violation of the statute, petitioned the state Supreme Court for a writ of prohibition to restrain Ferguson from proceeding to fine him. The petition recited that the charge was that the petitioner had insisted upon riding in a coach assigned to the white race, that the petitioner was "a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood." The state Supreme Court denied the petition and this writ of error was taken.]

MR. JUSTICE BROWN delivered the opinion of the Court. \* \* \*

The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. \* \* \* Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. \* \* \*

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have

been universally recognized as within the police power of the state.

\* \* \*

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

\* \* \* The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. \* \* \* Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties

of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. \* \* \*

Judgment affirmed.

Mr. JUSTICE HARLAN dissenting. \* \* \* The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. \* \* \*

[Mr. JUSTICE BREWER did not participate in the decision.]

#### NOTE

1. A state may not authorize a railway to provide sleeping cars, dining cars and chair cars for one race without also providing them for the other, and the fact that the demand for such accommodations by Negro passengers is so small as not to warrant the necessary outlay for them is immaterial. *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. 69 (1914). In the absence of federal legislation prohibiting it, a railway company may separate its white and Negro passengers in interstate commerce by virtue of its power to make "reasonable regulations" of its service, the court saying: "Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable." *Chiles v. Chesapeake & O. R. Co.*, 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. 667, 20 Ann. Cas. 980 (1910).

But the policy of segregating or not segregating white and Negro passengers on common carriers engaged in interstate commerce is not a local matter with which the states may deal. In *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547 (1878) a Louisiana statute forbidding the segregation of the races on public carriers, in this case a steamboat on the Mississippi River, was held invalid as a burden on interstate commerce. In *Morgan v. Virginia*, 328 U. S. 373, 90 L. ed. 1317, 66 Sup. Ct. 1050, 165 A. L. R. 574 (1946) a Virginia statute requiring segregation on interstate motor busses was held invalid for the same reason, the court saying: "It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel."

The Interstate Commerce Act (49 U. S. C. § 3(1); F. C. A. 49 § 3(1) (1946)) makes it unlawful for a railroad in interstate commerce to subject any person

to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This provision has been construed to forbid a railroad to deny facilities to a Negro passenger because those available have been set aside for white passengers. In *Mitchell v. United States*, 313 U. S. 80, 85 L. ed. 1201, 61 Sup. Ct. 873 (1941) an interstate Negro passenger holding a first-class ticket was compelled to transfer in Arkansas from a Pullman to a second-class car, although a seat in the former would have been available to him if he had been white. An Arkansas statute required segregation of Negroes from white passengers on railroad trains by the use of cars or partitioned sections providing "equal, but separate and sufficient accommodations" for both races. The court held that the passenger had been subjected to an unreasonable disadvantage in violation of the Interstate Commerce Act. The opinion stated: "The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment \* \* \* and in view of the nature of the right and of our Constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust." Applying the doctrine of the *Mitchell* case, the court held in *Henderson v. United States*, 339 U. S. 816, 94 L. ed. 1302, 70 Sup. Ct. 843 (1950) that railroad rules and practices which divided each dining car so as to allot ten tables exclusively to white passengers and one table exclusively to Negro passengers, and which called for a curtain or partition between that table and the others, violated the same section of the Interstate Commerce Act.

## SWEATT v. PAINTER.

Supreme Court of the United States, 1950.  
339 U. S. 629, 94 L. ed. 1114, 70 Sup. Ct. 848.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case and *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. *Rescue Army v. Municipal Court*, 331 U. S. 549, and cases cited therein. Because of this traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.

In the instant case, petitioner filed an application for admission to the University of Texas Law School for the February, 1946 term. His application was rejected solely because he is a Negro. Petitioner thereupon brought this suit for mandamus against the appropriate

school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The State trial court recognized that the action of the State in denying petitioner the opportunity to gain a legal education while granting it to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February. While petitioner's appeal was pending, such a school was made available, but petitioner refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause "remanded generally to the trial court for further proceedings without prejudice to the right of any party to this suit."

On remand, a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School. Finding that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," the trial court denied mandamus. The Court of Civil Appeals affirmed, 210 S. W. (2d) 442. Petitioner's application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, 338 U. S. 865, because of the manifest importance of the constitutional issues involved.

\* The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time pro-

fessors; a student body of 23; a library of some 16,500 volumes served by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U. S. 1, 22.

It is fundamental that these cases concern rights which are personal and present. This Court has stated unanimously that "The State must

provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." *Sipuel v. Board of Regents*, 332 U. S. 631, 633. That case "did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes." *Fisher v. Hurst*, 333 U. S. 147, 150. In *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 351, the Court, speaking through Chief Justice Hughes, declared that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity." These are the only cases in this Court which present the issue of the constitutional validity of race distinctions in state-supported graduate and professional education.

In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson*, 163 U. S. 537, requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation.

We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion. Reversed.

#### McLAURIN v. OKLAHOMA STATE REGENTS.

Supreme Court of the United States, 1950.  
339 U. S. 637, 94 L. ed. 1149, 70 Sup. Ct. 851.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

In this case, we are faced with the question whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race. We decide only this issue; see *Sweatt v. Painter*, 339 U. S. 629.

Appellant is a Negro citizen of Oklahoma. Possessing a Master's degree, he applied for admission to the University of Oklahoma in order to pursue studies and courses leading to a Doctorate in Education. At that time, his application was denied, solely because of his race. The school authorities were required to exclude him by the Oklahoma

statutes, 70 Okl. Stat. §§ 455, 456, 457 (1941) which made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught. Appellant filed a complaint requesting injunctive relief, alleging that the action of the school authorities and the statutes upon which their action was based were unconstitutional and deprived him of the equal protection of the laws. Citing our decisions in *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, and *Sipuel v. Board of Regents*, 332 U. S. 631, a statutory three-judge District Court held that the State had a constitutional duty to provide him with the education he sought as soon as it provided that education for applicants of any other group. It further held that to the extent the Oklahoma statutes denied him admission they were unconstitutional and void. On the assumption, however, that the State would follow the constitutional mandate, the court refused to grant the injunction, retaining jurisdiction of the cause with full power to issue any necessary and proper orders to secure McLaurin the equal protection of the laws.

Following this decision, the Oklahoma legislature amended these statutes to permit the admission of Negroes to institutions of higher learning attended by white students, in cases where such institutions offered courses not available in the Negro schools. The amendment provided, however, that in such cases the program of instruction "shall be given at such colleges or institutions of higher education upon a segregated basis." Appellant was thereupon admitted to the University of Oklahoma Graduate School. In apparent conformity with the amendment, his admission was made subject to "such rules and regulations as to segregation as the President of the University shall consider to afford Mr. G. W. McLaurin substantially equal educational opportunities as are afforded to other persons seeking the same education at the Graduate College," a condition which does not appear to have been withdrawn. Thus he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.

To remove these conditions, appellant filed a motion to modify the order and judgment of the District Court. That court held that such treatment did not violate the provisions of the Fourteenth Amendment and denied the motion. This appeal followed.

In the interval between the decision of the court below and the hearing in this Court, the treatment afforded appellant was altered. For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is per-

mitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.

It is said that the separations imposed by the State in this case are in form merely nominal. McLaurin uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage of location. He may wait in line in the cafeteria and there stand and talk with his fellow students, but while he eats he must remain apart.

These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.

Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley v. Kraemer*, 334 U. S. 1, 13-14. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.

We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See *Sweatt v. Painter*, 339 U. S. 629. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.

The judgment is Reversed.

## NOTES

1. In *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 83 L. ed. 208, 59 Sup. Ct. 232 (1938) it was held that Missouri denied the Negro petitioner the equal protection of its laws when it refused to admit him to the School of Law of the University of Missouri. The fact that, in accordance with state law, the University had offered to pay his tuition cost at any of the qualified law schools in neighboring states, was held not to alleviate the racial discrimination involved. The court, through Chief Justice Hughes, said: "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the state upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the state; the Negro resident having the same qualifications is refused it there and must go outside the state to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the state has set up, and the provision for the payment of tuition fees in another state does not remove the discrimination." Justices McReynolds and Butler dissented.

2. Prior to the decision in the *Gaines* case, the Supreme Court was apparently satisfied with something less than absolute or exact equality in the matter of educational facilities provided by the states. For example, in *Cumming v. County Board of Education*, 175 U. S. 528, 44 L. ed. 262, 20 Sup. Ct. 197 (1899) it upheld refusal of a Georgia state court to enjoin a school board from appropriating money or collecting taxes for the purpose of building a high school for white children, although there was no similar school for Negroes, the funds not being sufficient to maintain one in addition to needed primary schools for colored children. The court said that "the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

3. In *Sipuel v. Board of Regents of University of Oklahoma*, 332 U. S. 631, 92 L. ed. 247, 68 Sup. Ct. 299 (1948) the petitioner, a Negro, concededly qualified to receive professional legal education, was denied admission to the University of Oklahoma solely because of her color. Petitioner's application for a writ of mandamus was denied in the state district court and the Supreme Court of Oklahoma affirmed. The Supreme Court of the United States reversed and remanded, directing the state to provide legal education for the petitioner in conformity with the equal protection clause and provide it as soon as it did for applicants of any other group. Following this decision, the state within one month established a separate law school for Negroes. Petitioner, refusing to apply there, sought leave to file a petition for a writ of mandamus to compel compliance with the court's mandate in the *Sipuel* case. In *Fisher v. Hurst*, 333 U. S. 147, 92 L. ed. 604, 68 Sup. Ct. 389 (1948) the Supreme Court denied the motion, holding that the order of the Oklahoma district court following the *Sipuel* decision was in conformity with the mandate of that case. Pointing out that the district court had retained jurisdiction to hear and determine any question arising under its order, the Supreme Court said that whether or not the order was followed or disobeyed should be determined in the first instance by that court.

4. In an increasing number of cases in recent years judicial relief has been sought from existing inequalities in segregated school systems. The separate but equal doctrine was applied in *McKissick v. Carmichael*, 187 F. (2d) 949 (C. A. 4th 1951), cert. den., 341 U. S. 951, 95 L. ed. 1374, 71 Sup. Ct. 1021

(1951), where, in reversing the judgment of the federal district court, it was held that a separate law school established for Negroes in North Carolina was clearly inferior to the School of Law of the University of North Carolina. See, also, *Corbin v. County School Board of Pulaski County*, 177 F. (2d) 924 (C. A. 4th 1949); *Carr v. Corning*, 182 F. (2d) 14, 86 App. D. C. 173 (1950); *Carter v. School Board of Arlington*, 182 F. (2d) 531 (C. A. 4th 1950); *Brown v. Ramsey*, 185 F. (2d) 225 (C. A. 8th 1950). In *Alston v. School Board of City of Norfolk*, 112 F. (2d) 992, 130 A. L. R. 1506 (1940), cert. den., 311 U. S. 693, 85 L. ed. 448, 61 Sup. Ct. 75 (1940) it was held that in the segregated school system of Norfolk, Virginia, Negro teachers must be paid the same salaries as white teachers where they perform the same duties.

5. As the opinions in *Missouri ex rel. Gaines v. Canada and Sweatt v. Painter* make clear, the Supreme Court never (prior to its decision on May 17, 1954) construed the guaranty of the equal protection of the laws as preventing the states from providing for racial segregation in education. It was content to follow the rule of *Plessy v. Ferguson*, limited only by the general requirement that the "separate" accommodations and facilities supplied for the two races be "equal." In *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. 33 (1908) the court upheld a Kentucky statute prohibiting domestic corporations from operating any school where white and Negro students were received together as pupils for instruction, unless they were taught at separate branches at a distance of at least twenty-five miles from each other. Against the contention of the college that the statute impaired the terms of its charter and hence violated the contract clause, the court said that the state had reserved the power to alter or repeal and the law did not substantially impair the object of the grant. In *Gong Lum v. Rice*, 275 U. S. 78, 72 L. ed. 172, 48 Sup. Ct. 91 (1927) a girl of Chinese parentage, an American citizen by birth, was excluded under a segregation provision of the Mississippi Constitution from enrollment in a white school and permitted only to attend a school for Negroes. In answer to the contention that classifying Negroes and Mongolians together while distinguishing between whites and Mongolians operated as a denial of equal protection, the court said: "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the federal Constitution."

For a recent analysis of the historical evidence in which the authors conclude that "a very large number" of the supporters of the Fourteenth Amendment thought that it forbade segregated schools, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131, 153-162 (1950). Among other valuable recent materials dealing with various aspects of racial discrimination in education, see the following: Reppy, *Civil Rights in the United States* (1951), ch. VI; *Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against Segregation in Legal Education*, 34 Minn. L. Rev. 289 (1950); Roche, *Education, Segregation and the Supreme Court—A Political Analysis*, 99 U. of Pa. L. Rev. 949 (1951); Ransmeier, *The Fourteenth Amendment and the "Separate but Equal" Doctrine*, 50 Mich. L. Rev. 203 (1951); Taylor, *The Demise of Race Restrictions in Graduate Education*, 1 Duke B. J. 135 (1951); Note, 1950 Wash. U. L. Q. 594; Note, 61 Yale L. J. 730 (1952); Comment, 24 So. Cal. L. Rev. 74 (1950). Supreme Court decisions dealing with all forms of race discrimination are collected in the annotation in 94 L. ed. 1121 (1950).

## BROWN v. BOARD OF EDUCATION OF TOPEKA.

Supreme Court of the United States, 1954.

347 U. S. 483, 98 L. ed. 873, 74 Sup. Ct. 686, 38 A. L. R. (2d) 1180.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public educa-

tion at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public education had already advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, *supra*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. Board of Education of Richmond County*, 175 U. S. 528 and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Board of Regents of University of Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, *supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "\* \* \* his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro

group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

Cases ordered restored to docket for further argument on question of appropriate decrees.

### BOLLING v. SHARPE.

Supreme Court of the United States, 1954.  
347 U. S. 497, 98 L. ed. 884, 74 Sup. Ct. 693.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law

under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. We granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented. 344 U. S. 873.

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race." And in *Buchanan v. Warley*, 245 U. S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

For the reasons set out in *Brown v. Board of Education*, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court. 345 U. S. 972.

It is so ordered.

Case restored to docket for reargument on question of appropriate decree.

#### NOTE

1. In declaring against segregation in the reported cases the Supreme Court rendered unconstitutional the laws providing for separate schools in twenty-one states. In seventeen of these states maintenance of separate school systems is mandatory. Segregation has also been practiced in the District of Columbia. The mandatory segregation states are: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. In four states, Wyoming, Kansas, New Mexico and Arizona, separate schools are permitted, particularly at the elementary level, at the option of local school boards either in all or in specified communities. In Wyoming the option has never been exercised. Sixteen states, either by their constitutions or by statutes, prohibit segregation. In a number of these the prohibition has been enacted since World War II. The remaining eleven states currently have no legislation on the subject. The end of segregation by law, however, does not necessarily mean the end of segregation in fact. In a number of northern states, in cities where there are large Negro populations, many schools exist where all, or nearly all, of the pupils are Negroes because no white children live in the neighborhood. (Congressional Quarterly—Weekly Report, June 4, 1954, pp. 689, 691.)

#### BUCHANAN v. WARLEY.

Supreme Court of the United States, 1917.  
245 U. S. 60, 62 L. ed. 149, 38 Sup. Ct. 16.

[This was a suit for specific performance of a contract for the sale of real estate in Louisville, Kentucky, brought by the seller. The defendant answered that the seller had expressly stipulated that the buyer should not be required to accept a deed if he could not legally occupy the premises as his residence; that defendant was a Negro; that there were ten residences in the block of which the lot in question was a part, eight of them occupied by whites, two by Negroes, and that he could not lawfully occupy the premises because of a city ordinance which forbade any white or black person to move into and occupy as a residence any house upon any block in which more than half the houses were already occupied by persons of the other color. The plaintiff replied that the ordinance was invalid because violative of the Fourteenth Amendment. The Court of Appeals of Kentucky, 165 Ky. 559, held the ordinance valid and a complete defense to the action. Now on writ of error:]

Mr. JUSTICE DAY delivered the opinion of the Court. \* \* \*

This ordinance prevents the occupancy of a lot in the City of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists colored persons are excluded. This interdiction is based wholly upon color; simply that and nothing more. In effect, premises situated as are those in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color.

This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this Court. \* \* \*

The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. \* \* \*

True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. \* \* \*

The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant. \* \* \*

The defendant in error insists that *Plessy v. Ferguson*, 163 U. S. 537, is controlling in principle in favor of the judgment of the court below. \* \* \* It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. In

*Plessy v. Ferguson*, classification of accommodation was permitted upon the basis of equality for both races. \* \* \*

That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges. \* \* \*

It is the purpose of such enactments, and, it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.

The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.

It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand. *Booth v. Illinois*, 184 U. S. 425, 429; *Otis v. Parker*, 187 U. S. 606, 609.

Reaching this conclusion it follows that the judgment of the Kentucky Court of Appeals must be reversed, and the cause remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

#### NOTE

1. It will be noted that the principal case was decided under the due process clause. It was criticised adversely as extending greater protection under the Constitution to the property rights of Negroes than to their personal rights. The decision encouraged the use of restrictive covenants inserted in deeds of conveyance of real property by which the successive purchasers bound them-

selves not to sell or lease the property to Negroes. What cities were forbidden to do by municipal regulation was done by individual property owners through private contracts. For discussions of segregation ordinances, restrictive covenants and conditional conveyances, see Martin, *Segregating Residences of Negroes*, 32 Mich. L. Rev. 721 (1934), 2 *Selected Essays on Constitutional Law* (1938), 1175; Bowman, *The Constitution and Common Law Restraints on Alienation*, 8 B. U. L. Rev. 1 (1928), 2 *Selected Essays on Constitutional Law* (1938), 1195. A recent case invalidating a racial zoning ordinance of Birmingham, Alabama, is *Birmingham v. Monk*, 185 F. (2d) 859 (C. A. 5th 1950).

### SHELLEY v. KRAEMER.

Supreme Court of the United States, 1948.  
334 U. S. 1, 92 L. ed. 1161, 68 Sup. Ct. 836, 3 A. L. R. (2d) 441.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

"\* \* \* the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [sic] not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty years, occupied by any person not of the Caucasian race, it being intended to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within

the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to the agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race.

"It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment.

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of *Corrigan v. Buckley*, 271 U. S. 323. There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes. The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked, apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudi-

cation on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

The second of the cases involving racial restrictive covenants was *Hansberry v. Lee*, 311 U. S. 32. In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the affected property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property \* \* \* against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race." \* \* \*

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Court has given specific recognition to the same principle. *Buchanan v. Warley*, 245 U. S. 60.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley*, *supra*, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."

In *Harmon v. Tyler*, 273 U. S. 668, a unanimous Court, on the authority of *Buchanan v. Warley*, *supra*, declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected."

The precise question before this Court in both the *Buchanan* and *Harmon* cases, involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color, is clear, not only from the language of the opinion in *Buchanan v. Warley*, *supra*, but from this Court's disposition of the case of *Richmond v. Deans*, 281 U. S. 704. There, a Negro, barred from the occupancy of certain property by the terms of an ordinance similar to that in the *Buchanan* case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance, on the grounds that its provisions violated the terms of the Fourteenth Amendment. Such relief was granted, and this Court affirmed, finding the citation of *Buchanan v. Warley*, *supra*, and *Harmon v. Tyler*, *supra*, sufficient to support its judgment.

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases

from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. *Cf. Corrigan v. Buckley, supra.*

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Virginia v. Rives*, 100 U. S. 313, 318, this Court stated: "It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In *Ex parte Virginia*, 100 U. S. 339, 347, the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way."

\* \* \*

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. *Moore v. Dempsey*, 261 U. S. 86. And see *Frank v. Mangum*, 237 U. S. 309. Convictions obtained by coerced confessions, by the use of perjured

testimony known by the prosecution to be such, or without the effective assistance of counsel, have been held also to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in *American Federation of Labor v. Swing*, 312 U. S. 321, enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In *Cantwell v. Connecticut*, 310 U. S. 296, a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges v. California*, 314 U. S. 252, enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. \* \* \*

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

\* \* \*

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which

the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color." \* \* \*

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the

ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf. Marsh v. Alabama*, 326 U. S. 501. \* \* \*

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

## NOTES

1. In the companion case of *Hurd v. Hodge*, 334 U. S. 24, 92 L. ed. 1187, 68 Sup. Ct. 847 (1948) the Supreme Court also invalidated the judicial enforcement of racial restrictive covenants by the federal courts of the District of Columbia. Here, however, the court rested its decision on the ground that the challenged judicial action violated the guaranties of the federal Civil Rights Act of 1866 (now 42 U. S. C. § 1982; F. C. A. 42 § 1982) which provides that "all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The court also held that, even in the absence of the statute, the enforcement of the covenants was contrary to the public policy of the United States and, as such, should be corrected in the exercise of the court's supervisory powers over the District of Columbia courts. The court said: "White sellers, one of whom is a petitioner here, have been enjoined from selling the properties to any Negro or colored person. Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold and convey real property is to reject the plain meaning of language." See also the dissenting opinion of Judge Edgerton in the court below, 162 F. (2d) 233, 82 App. D. C. 180 (1947).

2. For some twenty years *Corrigan v. Buckley*, 271 U. S. 323, 70 L. ed. 969, 46 Sup. Ct. 521 (1926), distinguished in the principal case, had been cited as authority for the proposition that racial restrictive covenants excluding Negroes from residential areas were both valid and enforceable. The blue-print for the constitutional attack which came to fruition in *Shelley v. Kraemer* and *Hurd v. Hodge* was drawn by the late Professor McGovney in his forthright and cogent analysis: *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 Cal. L. Rev. 5 (1945). For discussions of the cases see Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. of Chi. L. Rev. 203 (1949); Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values*, 24 Notre Dame Lawyer 157 (1948); Lowe, *Racial Restrictive Covenants*, 1 Ala. L. Rev. 15 (1948); Crooks, *The Racial Covenant Cases*, 37 Geo. L. Rev. 514 (1949); Lathrop, *The Racial Covenant Cases*, 1948 Wis. L. Rev. 508; Sayre, *Shelley v. Kraemer and United Nations Law*, 34 Iowa L. Rev. 1 (1948); Comment, 21 So. Cal. L. Rev. 358 (1948); Note, 61 Harv. L. Rev. 1450 (1948); Note, 48 Col. L. Rev. 1241 (1948). See also, generally, Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219 (1946); Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 Ill. L. Rev. 13 (1949).

3. In *Barrows v. Jackson*, 346 U. S. 249, 97 L. ed. 1586, 73 Sup. Ct. 1031 (1953) the issue was whether a racial restrictive covenant can be enforced in a suit at law for damages against a co-covenantor. The owners of residential estates in the same neighborhood in Los Angeles entered into a covenant, running with the land, restricting the use and occupancy thereof to persons of the white or Caucasian race, and obligating the signers to incorporate this restriction in all transfers of land. For breaching the covenant in both respects, an action for damages was brought against defendant by other signers. No action was taken against the non-Caucasian occupants. A demurrer to the complaint was sustained by the trial court and this was affirmed by the district court of appeal, in view of the holding in *Shelley v. Kraemer*. On certiorari, "because of the importance of the constitutional question involved and to consider the conflict which has arisen in the decisions of the state courts since our ruling in the *Shelley case*," the Supreme Court affirmed, holding that award by a state court of damages against a covenantor for breach of the restrictive covenant would constitute state action which would deprive non-Caucasians, unidentified but identifiable, of equal

protection of the laws in violation of the Fourteenth Amendment. The opinion by Mr. Justice Minton said: "This court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this court would deny California the right to enforce in equity, Shelley, supra; or that this court would deny California the right to incorporate in a statute, Buchanan v. Warley, 245 U. S. 60; or that could not be enforced in a federal jurisdiction because such a covenant would be contrary to public policy." Chief Justice Vinson dissented on the ground that the defendant had not shown that she was, herself, a victim of unconstitutional discrimination. He said: "The plain, admitted fact that there is no identifiable non-Caucasian before this court who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit, or any other particular properties, is decisive to me."

Prior to this decision, state courts had reached divergent views on the question involved. Like the California courts, the Supreme Court of Michigan had sustained a dismissal of a claim for damages for breach of a racial restrictive covenant, Phillips v. Naff, 332 Mich. 389, 52 N. W. (2d) 158 (1952). The Supreme Court of Missouri reached a contrary result, Weiss v. Leon, 359 Mo. 1054, 225 S. W. (2d) 127 (1949), while the Supreme Court of Oklahoma had held that a claim for damages might be maintained against a white seller, an intermediate straw man, and a non-Caucasian purchaser for a conspiracy to violate the covenant, Correll v. Earley, 205 Okla. 366, 237 Pac. (2d) 1017 (1951). See Note, 37 Cal. L. Rev. 493 (1949); Groves, Judicial Interpretations of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases, 45 Ill. L. Rev. 614 (1950).

4. Statutes in effect in a considerable number of states forbid the intermarriage of white persons and persons of various colored races. Prior to the decision of the Supreme Court of California in Perez v. Sharp, 32 Cal. (2d) 711, 198 Pac. (2d) 17 (1948), invalidating the California law prohibiting "marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes," such statutes were repeatedly held constitutional. In the Perez case, in a four to three decision, it was held that the right to marry the person of one's choice is a fundamental human right and that "legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws." For discussions of the case see Comment, 22 So. Cal. L. Rev. 27 (1948); Comment, 22 So. Cal. L. Rev. 31 (1948). See also Note, 58 Yale L. J. 472 (1949).

### Section 3.—Discrimination Against Aliens.

#### YICK WO v. HOPKINS.

Supreme Court of the United States, 1886.  
118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. 1064.

[The city and county of San Francisco enacted an ordinance as follows: "It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." Violation of the ordinance was made a misdemeanor punishable by fine or imprisonment. Yick Wo was convicted thereunder and

committed for non-payment of a fine imposed. He applied to the Supreme Court of California for a writ of habeas corpus, contending that he was being held in violation of the equal protection clause of the Fourteenth Amendment. The following allegations of fact were admitted: that Yick Wo was an alien of Chinese descent; that he had conducted a laundry in the same building for 22 years; that he had applied for and had been refused a renewal of his license; that his building had been inspected by the fire warden and approved; that his laundry had been inspected by the sanitary inspectors and approved; that of the 320 laundries in the city 240 were owned by Chinese aliens and that 310 were constructed of wood, as was Yick Wo's; that 200 Chinese who had applied for laundry licenses had been denied them, while all applications by persons who were not Chinese had been granted, with a single exception. The Supreme Court of California denied the petition and this writ of error was taken. Wo Lee, another Chinese alien, convicted upon like facts, petitioned a Circuit Court of the United States for a writ of habeas corpus. The petition was denied and his appeal to the United States Supreme Court was considered along with Yick Wo's writ of error.]

MR. JUSTICE MATTHEWS delivered the opinion of the Court.

\* \* \*

The ordinance drawn in question in the present case \* \* \* does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. \* \* \*

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, or color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. \* \* \*

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

\* \* \*

In the present cases, we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of

unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. \* \* \*

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged.

#### NOTE

1. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 62 L. ed. 1154, 38 Sup. Ct. 495 (1918).

TRUAX v. RAICH.

Supreme Court of the United States, 1915.  
239 U. S. 33, 60 L. ed. 131, 36 Sup. Ct. 7.

[Bill for an injunction in the United States District Court for the District of Arizona. Decree granted and defendants appeal.]

MR. JUSTICE HUGHES delivered the opinion of the Court.

Under the initiative provision of the Constitution of Arizona (Art. IV, § 1), there was adopted the following measure which was proclaimed by the Governor as a law of the state on December 14, 1914: [The enactment required every employer of more than five workers at any one time in Arizona to employ not less than 80% who were qualified electors or native-born citizens of the United States. Violation was declared a misdemeanor subject to a fine of not less than \$100 and imprisonment for not less than 30 days.] \* \* \*

Mike Raich (the appellee), a native of Austria, and an inhabitant of the State of Arizona but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the City of Bisbee, Cochise County. Truax had nine employes, of whom seven were neither "native-born citizens" of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the District Court of the United States for the District of Arizona, asserting among other things that the act denied to him the equal protection of the laws and hence was contrary to the Fourteenth Amendment of the Constitution of the United States. Wiley E. Jones, the attorney general of the state, and W. G. Gilmore, the county attorney of Cochise County, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

Soon after the bill was filed, an application was made for an injunction pendente lite. After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the County Attorney of Cochise County, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The defendants joined in a motion to dismiss upon the grounds (1) that the suit was

against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by section 266 of the Judicial Code. The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. 273. This direct appeal has been taken.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, which has repeatedly been followed. \* \* \*

It is also settled that while a court of equity, generally speaking, has "no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors" (*In re Sawyer*, 124 U. S. 200, 210), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218; *Dobbins v. Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, *supra*; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. \* \* \* It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer

to discharge a sufficient number of his employés to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. See *Gegiov v. Uhl*, 239 U. S. 3. Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—"any person within its jurisdiction"—as it has frequently been held, includes aliens. \* \* \* The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. Thus in *McCready v. Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham*, 100 U. S. 483; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time "regardless of kind or class of work, or sex of workers" shall employ "not less than eighty per cent. qualified electors or native born citizens of the United States or some subdivision thereof." It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which

requires nine employees. The purpose of an act must be found in its natural operation and effect (*Henderson v. Mayor*, 92 U. S. 259, 268; *Bailey v. Alabama*, 219 U. S. 219, 244), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as "An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona." As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. \* \* \*

It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. \* \* \* If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that "the employment of aliens unless restrained was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labor"; that is, the restriction is limited to those businesses in which more than five workers are

employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent. of his employees. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. *Otis v. Parker*, 187 U. S. 606; *Silz v. Hesterburg*, 211 U. S. 31; *Purity Co. v. Lynch*, 226 U. S. 192. If the restriction to twenty per cent. now imposed is maintainable the state undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limitation to twenty per cent. save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent. of the employees to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 207; *McLean v. Arkansas*, 211 U. S. 539, 551; *Miller v. Wilson*, 236 U. S. 373, 384); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law. \* \* \* Order affirmed.

[MR. JUSTICE McREYNOLDS, conceding that the challenged act was invalid, dissented on the ground that the suit was against the State and thus barred by the Eleventh Amendment.]

# NOTES

1. In *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. 78, Ann. Cas. 1917B, 287 (1915) a New York statute was upheld which provided that in the construction of public works by the state or a municipality only citizens of the United States should be employed. The decision was not rested on the ground that aliens might make less desirable laborers than citizens but on the proposition that the state as an employer has the same freedom to discriminate against any class in the selection of its employees as that enjoyed by an individual employer. The court regarded *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. 124 (1903), as determinative of the constitutional issue. The statute upheld in that case forbade the employment of workmen more than eight hours per day by any contractor in the execution of contracts with the state or any of its counties,

cities, or other municipal subdivisions, and required the payment of not less than the current rate of per diem wages in that locality. It has been pointed out in a careful analysis of the issues involved that no such discrimination as that present in the New York statute was before the court in *Atkin v. Kansas*, and that the decision in that case cannot properly be regarded as authority for *Heim v. McCall*. See Powell, *The Right to Work for the State*, 16 Col. L. Rev. 99 (1916), 2 Selected Essays on Constitutional Law (1938), 1237. See also Note, *Constitutionality of Legislative Discrimination Against the Alien in his Right to Work*, 83 U. of Pa. L. Rev. 74 (1934), 2 Selected Essays on Constitutional Law (1938), 1251. In this connection note the recently enacted (1945) New York Law Against Discrimination (N. Y. Exec. Law, Art. 15, §§ 290-301) which provides, *inter alia*, that "the opportunity to obtain employment without discrimination because of race, creed, color or national origin is hereby recognized as and declared to be a civil right."

2. In *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. 281 (1914) it was held that resident aliens may be forbidden shooting wild game within the state. The law was challenged under the Fourteenth Amendment as unjustifiably depriving aliens of property and as discriminating against them as a class. The decision was rested partly upon the view that wild game is the common property of the citizens of the state, as recognized in decisions holding that even citizens of other states may be forbidden to kill or capture it or subjected to discriminatory fees for hunting and fishing licenses, and partly on the idea that since the state may forbid the killing or capturing of the game absolutely, it may exercise an arbitrary power to preserve it for one class of persons while denying it to another class. "It is not enough to invalidate the law that others may do the same thing and go unpunished, if as a matter of fact, it is found that the danger is characteristic of the class named."

#### OHIO EX REL. CLARKE v. DECKEBACH.

Supreme Court of the United States, 1927.

274 U. S. 392, 71 L. ed. 1115, 47 Sup. Ct. 630.

MR. JUSTICE STONE delivered the opinion of the Court.

An ordinance, No. 76-1918, of the City of Cincinnati, requires the licensing of pool and billiard rooms, and prohibits the issue of licenses to aliens. Plaintiff in error petitioned the Supreme Court of Ohio for a writ of mandamus commanding defendant in error, the auditor of Cincinnati, to grant him a license to conduct a billiard and pool room in that city. The petition alleged that plaintiff was a subject of the King of England and that he had been refused a license solely because he was not a citizen. It drew in question the validity of the ordinance as violating Art. I of the treaty between Great Britain and the United States of July 3, 1815, 8 Stat. 228; August 6, 1927, 8 Stat. 361; 1 Malloy, *Treaties*, 624, 645, and as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.

Defendant answered, traversing the allegation of citizenship, and asserting that billiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; that they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delinquency; that numerous crimes and offenses have been committed

in them and consequently they require strict police surveillance; that non-citizens as a class are less familiar with the laws and customs of this country than native born and naturalized citizens; that the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare, and that the ordinance is a reasonable police regulation passed in the interest of and for the benefit of the public.

On plaintiff's motion, the Supreme Court of Ohio gave judgment on the pleadings, dismissing the petition. \* \* \*

The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, *Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *In re Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, 12 Fed. Cases, No. 6546; *Wong Wai v. Williamson*, 103 Fed. 1; *Fraser v. McConway & Torley Co.*, 82 Fed. 257, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification. *Patson v. Pennsylvania*, 232 U. S. 138; *Crane v. New York*, 239 U. S. 195, 198; *Terrace v. Thompson*, 263 U. S. 197; *Porterfield v. Webb*, 263 U. S. 225; *Webb v. O'Brien*, 263 U. S. 313; *Frick v. Webb*, 263 U. S. 326; *Cockrill v. California*, 268 U. S. 258; cf. *McCready v. Virginia*, 94 U. S. 391.

The admitted allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this Court took judicial notice in *Murphy v. California*, 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. *Murphy v. California*, supra. The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387.

Some latitude must be allowed for the legislative appraisal of local conditions, *Patson v. Pennsylvania*, supra, 144; *Adams v. Milwaukee*, 228 U. S. 572, 583, and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable

members selected by more empirical methods. See *Westfall v. United States*, 274 U. S. 256. Judgment affirmed.

#### NOTE

1. In *Takahashi v. Fish and Game Commission*, 334 U. S. 410, 92 L. ed. 1478, 68 Sup. Ct. 1138 (1948) the Supreme Court invalidated as a denial of equal protection a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible to citizenship. Takahashi, born in Japan, came to this country and became a resident of California in 1907. Under an amendment to California laws passed in 1945, the issuance of fishing licenses was banned to any "person ineligible to citizenship," which classification (at that time) included Japanese. The Supreme Court of California (three judges dissenting) held that California had a proprietary interest in fish in the ocean waters within three miles of the shore, and that this interest justified the challenged legislation. Reversing, the Supreme Court rested its decision in part on *Truax v. Raich*, but further said that it did not follow that because the United States might regulate immigration and naturalization in part on the basis of race and color classifications, a state could adopt one or more of the same classifications to prevent aliens within its borders from earning a living in the same way that other inhabitants earn a living. The opinion also rejected the contention that there was any special public interest warranting California's exclusion of aliens from commercial fishing by reason of their ineligibility to citizenship. Justices Reed and Jackson, dissenting, said that while Congress may require the states to remove restrictions against aliens, until it does so the judiciary should not compel the states to place citizens and aliens on a basis of equality in such matters as the ownership of land and the exploitation of natural resources. They thought that, since fishing rights have been treated traditionally as a natural resource, California had power, in the absence of federal legislation, to regulate the taking and handling of fish in the waters bordering its shores.

#### TERRACE v. THOMPSON.

Supreme Court of the United States, 1923.

263 U. S. 197, 68 L. ed. 255, 44 Sup. Ct. 15.

[A statute of the State of Washington prohibited ownership by aliens (except those who had in good faith declared intention to become citizens of the United States) of any legal or equitable interest in any land (except for a few specified purposes). Terrace, a land owner, and Nakatsuka, an alien Japanese, who desired that the former should lease the land to the latter for farming (a forbidden purpose) joined in a suit in the District Court of the United States to enjoin the Attorney General of the State from enforcing the statute, and appealed from a dismissal of the suit.]

MR. JUSTICE BUTLER delivered the opinion of the Court. \* \* \*

This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. \* \* \* But this does not forbid every distinction in the law of a state between citizens and aliens resident therein. \* \* \*

The rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the states the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress, declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants. \* \* \*

The inclusion of good faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible or against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammelled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable consideration of public policy.

The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not. Appellants' contention that the state act discriminates arbitrarily against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act.

\* \* \*

*Truax v. Raich*, 239 U. S. 33, does not support the appellants' contention. \* \* \*

In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself.

The Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease. The state act is not repugnant to the equal protection clause and does not contravene the Fourteenth Amendment.

\* \* \*

The decree of the District Court is affirmed.

MR. JUSTICE McREYNOLDS and MR. JUSTICE BRANDEIS think there is no justiciable question involved and that the case should have been dismissed on that ground.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

#### NOTE

1. In accord with the principal case are the several decisions sustaining the California Alien Land Law forbidding aliens ineligible to citizenship under federal law from owning any legal or beneficial interest in agricultural land: *Porterfield v. Webb*, 263 U. S. 225, 68 L. ed. 278, 44 Sup. Ct. 21 (1923) (leasing of such land); *Webb v. O'Brien*, 263 U. S. 313, 68 L. ed. 318, 44 Sup. Ct. 112 (1923) (share-cropping of land); *Frick v. Webb*, 263 U. S. 326, 68 L. ed. 323, 44 Sup. Ct. 115 (1923) (acquiring stock in corporation holding land for agricultural purposes).

In *Oyama v. California*, 332 U. S. 633, 92 L. ed. 249, 68 Sup. Ct. 269 (1948) the constitutionality of the California statute was again challenged as a violation of the equal protection clause. Here the state sought to escheat two parcels of land which had been purchased by a Japanese father, ineligible for naturalization, for his son, a minor American citizen, in whose name title was taken, the father having obtained appointment as his guardian. The trial court found as facts that the father had had the beneficial use of the land and that the transfers were subterfuges effected with intent to evade or avoid escheat; it therefore held that the land had vested in the state as of the date of the attempted transfers. The California Supreme Court sustained the trial court's findings and ruled that the son was deprived of no constitutional guaranties since the land had passed to the state without ever vesting in him. The Supreme Court of the United States reversed on one ground only, *i. e.*, the unconstitutionality of § 9 of the statute which (1) declared a *prima facie* presumption that a conveyance was made with intent to evade or avoid the statute if title to real property was taken in the name of a person eligible to citizenship and the consideration was paid by a noneligible alien, and (2) placed the burden on the grantee to show the conveyance was not made with the intent to evade or avoid escheat. The court declined to reexamine the constitutionality of any provision of the statute other than § 9. Chief Justice Vinson's opinion said that the state had discriminated against the son solely because of his parents' country of origin and that there was absent the compelling justification essential to sustain discrimination of that character. The effect of the statutory presumption was to place upon the son an onerous burden of proof which was not borne by other children in similar situations and thus to bring about an unconstitutional discrimination. In two separate concurring opinions four justices (Black, Douglas, Murphy and Rutledge) voiced the belief that the statute violated the equal protection clause and conflicted with federal laws and treaties governing the immigration of aliens and their rights after arrival in this country. Although the statute did not name the Japanese as such, its plain purpose and effect was to discriminate against them because of their origin. Three justices (Reed, Burton and Jackson) dissented. The dissents emphasized the logical difficulties involved in striking down the statutory presumption designed to facilitate the enforcement of the law and at the same time assuming the validity of its basic prohibition in respect to the ownership of land by ineligible aliens.

Two years later, in *Sei Fujii v. California*, 97 A. C. A. 154, 718, 217 Pac. (2d) 481, 218 Pac. (2d) 595 (1950), a California district court of appeal held the California law to be no longer enforceable because in conflict with the Charter of the United Nations. The Supreme Court of California, in the same

litigation, reached the same result as the lower court but based its decision squarely on the due process and equal protection clauses of the Fourteenth Amendment. The court concluded that a reexamination of the constitutional issue was not foreclosed by the earlier decisions of the Supreme Court in 1923 upholding the statute, since the force and effect of these decisions had been materially weakened by *Oyama v. California* and *Takahashi v. Fish and Game Commission*, setting forth constitutional principles irreconcilable with the reasoning of the earlier cases. The court held that the rights to acquire, enjoy, own and dispose of property are among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment and that the power of a state to regulate the use and ownership of land must be exercised subject to the controls and limitations of that Amendment. Hence, there could be no justification for a classification which operated to withhold property rights from some aliens, not because of anything they had done or any beliefs they held, but solely because they were members of a certain race. Three justices dissented, arguing that the court was bound by the earlier precedents. *Sei Fujii v. California*, 38 Cal. (2d) 718, 242 Pac. (2d) 617 (1952). It was announced officially by the Attorney-General of California that the state would not seek certiorari. Closely following the date of this decision, Congress enacted the Immigration and Nationality Act of 1952, one of the provisions of which (8 U. S. C. § 1422; F. C. A. § 8 § 1422) removes the bar of racial origin as a condition of naturalization. The statute would thus have been rendered a dead letter, irrespective of its constitutional invalidity.

#### Section 4.—Equality in Suffrage.

JAMES V. BOWMAN.

Supreme Court of the United States, 1903.  
190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. 678.

In December, 1900, an indictment was found by the United States District Court for the District of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon section 5507 of the Revised Statutes of the United States. The indictment charged in substance that certain "men of African descent, colored men, Negroes, and not white men," being citizens of Kentucky and of the United States, were, by means of bribery, unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the Fifth Congressional District of Kentucky on the 8th day of November, 1898, for the election of a representative in the fifty-sixth Congress of the United States.

No allegation is made that the bribery was because of the race, color or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of habeas corpus on the ground of the unconstitutionality of section 5507. The District Judge granted the writ, following reluctantly the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Lackey v. United States*, 46 C. C. A. 189; 107 Fed. Rep. 114. From that judgment the government has taken this appeal.

Section 5507 is as follows:

"Sec. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

The Fifteenth Amendment provides:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

MR. JUSTICE BREWER delivered the opinion of the Court.

The single question presented for our consideration is whether section 5507 can be upheld as a valid enactment, for if not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the Fifteenth Amendment, for it declares a punishment upon any one who by means of bribery prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action "by the United States or by any State," and does not contemplate wrongful individual acts. It is in this respect similar to \* \* \* the Fourteenth Amendment. \* \* \*

But we are not left alone to this reasoning from analogy. The Fifteenth Amendment itself has been considered by this Court and the same limitations placed upon its provisions. In *United States v. Reese*, 92 U. S. 214, 217, we said:

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from dis-

crimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'

In passing it may be noticed that this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority. The matter complained of was purely an individual act of the defendant. Nor is it charged that the bribery was on account of race, color or previous condition of servitude. True, the parties who were bribed were alleged to be "men of African descent, colored men, Negroes, and not white men," and again, that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment to the Constitution of the United States." But this merely describes the parties wronged as within the classes named in the amendment. They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color or previous condition of servitude is charged.

These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the state through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color or previous condition of servitude is likewise destitute of support by such amendment.

But the contention most earnestly pressed is that Congress has ample power in respect to elections of representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power. It is not legislation in respect to elections of federal officers, but is levelled at all elections, state or federal and it does not purport to punish bribery of any voter, but simply of those named in the Fifteenth Amendment. On its face it is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the Fifteenth Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to the statute. If the

contention be sustained it is simply a transformation of the statute in its single purpose and scope. \* \* \*

Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national Constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fix [fit] some particular transaction which Congress might have legislated for if it had seen fit.

The judgment of the District Court is Affirmed.

MR. JUSTICE MCKENNA took no part in the decision of this case.  
MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissented.

#### NOTE

1. The disabilities imposed upon the states and the United States by the Fifteenth and Nineteenth Amendments confer correlatively upon citizens of the United States immunities from the types of discrimination therein prohibited. These immunities are conferred upon none but citizens and consequently constitute a part of the concept of citizenship of the United States, notwithstanding that the privilege of voting is not an element of such citizenship. In *United States v. Cruikshank*, 92 U. S. 542, 555-556, 23 L. ed. 588 (1875), Mr. Chief Justice Waite, speaking for the court, said: "In *United States v. Reese* we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

#### GUINN v. UNITED STATES.

Supreme Court of the United States, 1915.

238 U. S. 347, 59 L. ed. 1340, 35 Sup. Ct. 926, L. R. A. 1916A, 1124.

MR. CHIEF JUSTICE WHITE delivered the opinion of the Court.

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the State of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that state in 1910, they being entitled to vote under the state law and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States. The prosecution was directly con-

cerned with Sec. 5508, Rev. Stat., now Sec. 19 of the Penal Code.

\* \* \*

The questions which the court below asks are these:

"1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void insofar as it attempted to debar from the right or privilege of voting for a qualified candidate for a member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that state, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

As these questions obviously relate to the provisions concerning suffrage in the original constitution and the amendment to those provisions which forms the basis of the controversy, we state the text of both. The original clause so far as material was this:

"The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment:

"No person shall be registered as an elector of this state or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the state of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote."

Considering the questions in the light of the text of the suffrage amendment it is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second

question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866, should be held to be illegal as violative of the Fifteenth Amendment. \* \* \* Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.* \* \* \*

Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning \* \* \*.

But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the states of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. \* \* \*

While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. *Ex parte Yarbrough*, 110 U. S. 651; *Neal v. Delaware*, 103 U. S. 370. \* \* \*

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This however is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. \* \* \* It is true it contains no express words of an exclusion from the standard

which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the bases of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view. \* \* \*

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866 standard with which it is associated in the suffrage amendment.*

No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former is really a question of state law, but in the absence of any decision on the subject by the Supreme Court of the state, we must determine it ourselves. \* \* \* [The Court inferred that these clauses were intended to be inseparable.] \* \* \*

We answer the first question, No, and the second question, Yes.

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.

#### NOTES

1. A substantially like statute of Maryland was held invalid in *Myers v. Anderson*, 238 U. S. 368, 59 L. ed. 1349, 35 Sup. Ct. 932 (1915). After the decision in the principal case, Oklahoma passed another statute in 1916 requiring (with certain exceptions) all citizens then qualified to vote but who had not voted in the election of 1914 to register within a twelve-day period. Those who did

not apply during this period lost permanently the right to register. In 1939 the court invalidated this scheme under the Fifteenth Amendment, holding that its practical effect was "to accord to the members of the Negro race who had been discriminated against in the outlawed registration system of 1914, not more than twelve days within which to reassert constitutional rights which were found in the Guinn case to have been denied them." The court concluded that the "narrow basis of the supplemental registration, the very brief normal period of relief for the purposes in question, the practical difficulties, of which the record in this case gives glimpses, inevitable in the administration of such strict registration provisions, leave no escape from the conclusion that the means chosen as substitutes for the invalidated 'grandfather clause' were themselves invalid under the Fifteenth Amendment." *Lane v. Wilson*, 307 U. S. 268, 83 L. ed. 1281, 59 Sup. Ct. 872 (1939).

2. A state may require the payment of a poll tax as a prerequisite to voting. *Breedlove v. Suttles*, 302 U. S. 277, 82 L. ed. 252, 58 Sup. Ct. 205 (1937). Poll taxes, which were formerly imposed in eleven Southern states, are now in effect in only five. Proposals to abolish the poll tax by federal legislation have been advanced unsuccessfully on many occasions in recent years. The President's Committee on Civil Rights endorsed such legislation in 1947. See Boudin, *State Poll Taxes and the Federal Constitution*, 28 Va. L. Rev. 1 (1941); Kallenbach, *Constitutional Aspects of Federal Anti-Poll Tax Legislation*, 45 Mich. L. Rev. 717 (1947); Christensen, *The Constitutionality of National Anti-Poll Tax Bills*, 33 Minn. L. Rev. 217 (1949).

3. A state may require citizens of the United States who move into the state to make a declaration of intention to become citizens of the state one year before they may register as voters, and thus discriminate in granting the electoral privilege between those citizens who have and those who have not made the declaration. *Pope v. Williams*, 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. 573 (1904).

4. Although a state may validly impose literacy, educational, character and other qualifications for voting, such tests must not be purposefully used as a device to disenfranchise only Negroes. In 1946 Alabama adopted the "Boswell Amendment" to its state constitution which required a prospective elector to "understand and explain any article of the Constitution of the United States" to the satisfaction of local registration officers. Negro plaintiffs alleged that the amendment was sponsored, its adoption obtained, and its provisions were being administered in order to prevent them, because of their race, from exercising their right to vote. A three-judge federal district court held that the amendment, both in its object and the manner of its administration, was in violation of the Fifteenth Amendment. The court said that it could not ignore the impact of the amendment upon Negro citizens merely because it avoided mention of race or color. The Supreme Court affirmed *per curiam*, without hearing argument. *Davis v. Schnell*, 81 F. Supp. 872 (D. C. S. D. Ala., 1949), affirmed 336 U. S. 933, 93 L. ed. 1093, 69 Sup. Ct. 749 (1949).

### UNITED STATES v. CLASSIC.

Supreme Court of the United States, 1941.

313 U. S. 299, 85 L. ed. 1368, 61 Sup. Ct. 1031.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

MR. JUSTICE STONE delivered the opinion of the Court.

Two counts of an indictment found in a federal district court charged that appellees, Commissioners of Elections, conducting a primary elec-

tion under Louisiana law, to nominate a candidate of the Democratic Party for representative in Congress, willfully altered and falsely counted and certified the ballots of voters cast in the primary election. The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right "secured \* \* \* by the Constitution" within the meaning of §§ 19 and 20 of the Criminal Code, and whether the acts of appellees charged in the indictment violate those sections.

On September 25, 1940, appellees were indicted in the District Court for Eastern Louisiana for violations of §§ 19 and 20 of the Criminal Code, 18 U. S. C. §§ 51, 52. The first count of the indictment alleged that a primary election was held on September 10, 1940, for the purpose of nominating a candidate of the Democratic Party for the office of Representative in Congress for the Second Congressional District of Louisiana, to be chosen at an election to be held on November 10th; that in that district nomination as a candidate of the Democratic Party is and always has been equivalent to an election; that appellees were Commissioners of Election, selected in accordance with the Louisiana law to conduct the primary in the Second Precinct of the Tenth Ward of New Orleans, in which there were five hundred and thirty-seven citizens and qualified voters.

The charge based on these allegations, was that the appellees conspired with each other and with others unknown, to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast. The overt acts alleged were that the appellees altered eighty-three ballots cast for one candidate and fourteen cast for another, marking and counting them as votes for a third candidate, and that they falsely certified the number of votes cast for the respective candidates to the chairman of the Second Congressional District Committee.

The second count, repeating the allegations of fact already detailed, charged that the appellees, as Commissioners of Election willfully and under color of law subjected registered voters at the primary who were inhabitants of Louisiana to the deprivation of rights, privileges and immunities secured and protected by the Constitution and Laws of the United States, namely their right to cast their votes for the candidates of their choice and to have their votes counted as cast. It further charged that this deprivation was effected by the wilful failure and refusal of defendants to count the votes as cast, by their alteration of the ballots, and by their false certification of the number of votes cast for the respective candidates in the manner already indicated.

The District Court sustained a demurrer to counts 1 and 2 on the ground that §§ 19 and 20 of the Criminal Code under which the indictment was drawn do not apply to the state of facts disclosed by the indictment and that, if applied to those facts, §§ 19 and 20 are without constitutional sanction, citing *United States v. Gradwell*, 243 U. S. 476, 488, 489; *Newberry v. United States*, 256 U. S. 232. The case comes here on direct appeal from the District Court under the provisions of the Criminal Appeals Act, Judicial Code, § 238, 18 U. S. C. § 682, 28 U. S. C. § 345, which authorize an appeal by the United States from a decision or judgment sustaining a demurrer to an indictment where the decision or judgment is "based upon the invalidity, or construction of the statute upon which the indictment is founded." \* \* \*

Section 19 of the Criminal Code condemns as a criminal offense any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States." Section 20 makes it a penal offense for anyone who, "acting under color of any law" "willfully subjects, or causes to be subjected, any inhabitant of any State \* \* \* to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." The Government argues that the right of a qualified voter in a Louisiana congressional primary election to have his vote counted as cast is a right secured by Article I, §§ 2 and 4 of the Constitution, and that a conspiracy to deprive the citizen of that right is a violation of § 19, and also that the willful action of appellees as state officials, in falsely counting the ballots at the primary election and in falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment, all in violation of § 20 of the Criminal Code.

Article I, § 2 of the Constitution, commands that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature." By § 4 of the same article "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives. \* \* \*

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, §§ 1 and 3.

The primary is conducted by the state at public expense. Act No. 46, supra, § 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, including provisions to insure that the ballots cast at the primary are correctly counted, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official ballot.

The Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act. Act 46, § 1. \* \* \*

The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas v. Trebucq*, 1 So. 2d 346, voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.

Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus as a matter of law and in fact an inter-

ference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. *Ex parte Yarbrough*, 110 U. S. 651; *United States v. Mosley*, 238 U. S. 383. \* \* \* While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see, *Minor v. Happersett*, 21 Wall. 162, 170; *United States v. Reese*, 92 U. S. 214, 217, 218; *McPherson v. Blacker*, 146 U. S. 1, 38, 39; *Breedlove v. Suttles*, 302 U. S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." See *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 663, 664; *Swafford v. Templeton*, 185 U. S. 487; *Wiley v. Sinkler*, 179 U. S. 58, 64.

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. \* \* \* And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. \* \* \*

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, § 2. We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than

they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

\* \* \*

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our Constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose or its words as any the less guaranteeing the integrity of that choice when a state, exercising its privilege in the absence of Congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Nor can we say that that choice which the Constitution protects is restricted to the second step because § 4 of Article I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by § 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress. The point whether the power conferred by § 4 includes in any circumstances the power to regulate primary elections was reserved in *United States v. Gradwell*, *supra*, 243 U. S. 487. In *Newberry v. United States*, *supra*, four Justices of this Court were of opinion that the term "elections" in § 4 of Article I did not embrace a primary election since that procedure was unknown to the framers. A fifth Justice who with them pronounced the judgment of the Court, was of opinion that a primary, held under a law enacted before the adoption of the Seventeenth Amendment, for the nomination of candidates for Senator, was not an election within the meaning of § 4 of Article I of the Constitution, presumably because the choice of the primary imposed no legal restrictions on the election of Senators by the state legislatures to which their election had been committed by Article I, § 3. The remaining four Justices were of the opinion that a primary election for the choice

of candidates for Senator or Representative were elections subject to regulation by Congress within the meaning of § 4 of Article I. The question then has not been prejudged by any decision of this Court.

To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes. As we have said, a dominant purpose of § 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives by the designated electors, that is to say, by some form of election. Cf. the Seventeenth Amendment as to popular "election" of Senators. From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates.

Long before the adoption of the Constitution the form and mode of that expression had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had guaranteed. The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in *Newberry v. United States*, *supra*.

Unless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries. Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom and integrity of the choice. Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it. \* \* \*

There remains the question whether §§ 19 and 20 are an exercise of the congressional authority applicable to the acts with which appellees are charged in the indictment. Section 19 makes it a crime to conspire to "injure" or "oppress" any citizen "in the free exercise \* \* \* of any right or privilege secured to him by the Constitution." In *Ex parte Yarbrough*, supra, and in *United States v. Mosley*, supra, as we have seen, it was held that the right to vote in a congressional election is a right secured by the Constitution, and that a conspiracy to prevent the citizen from voting or to prevent the official count of his ballot when cast, is a conspiracy to injure and oppress the citizen in the free exercise of a right secured by the Constitution within the meaning of § 19. In reaching this conclusion the Court found no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen "in the free exercise \* \* \* of any right or privilege secured to him by the Constitution," and concerned itself with the question whether the right to participate in choosing a representative is so secured. Such is our function here. Conspiracy to prevent the official count of a citizen's ballot, held in *United States v. Mosley*, supra, to be a violation of § 19 in the case of a congressional election, is equally a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election prerequisite to the choice of party candidates for a congressional election. In both cases the right infringed is one secured by the Constitution. The injury suffered by the citizen in the exercise of the right is an injury which the statute describes and to which it applies in the one case as in the other. \* \* \*

In the face of the broad language of the statute, we are pointed to no principle of statutory construction and to no significant legislative his-

tory which could be thought to sanction our saying that the statute applies any the less to primaries than to elections, where in one as in the other it is the same constitutional right which is infringed.  
\* \* \*

It is hardly the performance of the judicial function to construe a statute, which in terms protects a right secured by the Constitution, here the right to choose a representative in Congress, as applying to an election whose only function is to ratify a choice already made at the primary but as having no application to the primary which is the only effective means of choice. To withdraw from the scope of the statute, an effective interference with the constitutional right of choice, because other wholly different situations not now before us may not be found to involve such an interference, *cf.* *United States v. Bathgate*, 246 U. S. 220; *United States v. Gradwell*, 243 U. S. 476, is to say that acts plainly within the statute should be deemed to be without it because other hypothetical cases may later be found not to infringe the constitutional right with which alone the statute is concerned.

If a right secured by the Constitution may be infringed by the corrupt failure to include the vote at a primary in the official count, it is not significant that the primary, like the voting machine, was unknown when § 19 was adopted. Abuse of either may infringe the right and therefore violate § 19. \* \* \* Nor does the fact that in circumstances not here present there may be difficulty in determining whether the primary so affects the right of the choice as to bring it within the constitutional protection, afford any ground for doubting the construction and application of the statute once the constitutional question is resolved. That difficulty is inherent in the judicial administration of every federal criminal statute, for none, whatever its terms, can be applied beyond the reach of the congressional power which the Constitution confers. \* \* \*

The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this § 20 also gives protection. The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law. *Ex parte Virginia*, 100 U. S. 339, 346; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 287, *et seq.*; *Hague v. C. I. O.*, 307 U. S. 496, 507, 519. Here the acts of appellees infringed the constitutional right and deprived the voters of the benefit of it within the meaning of § 20, unless by its terms its application is restricted to deprivations "on account of [an] inhabitant being an alien, or by reason of his color, or race."

The last clause of § 20 protects inhabitants of a state from being subjected to different punishments, pains or penalties by reason of alienage, color or race, than are prescribed for the punishment of citizens. That the qualification with respect to alienage, color and race, refers only to differences in punishment and not to deprivations of any rights or privileges secured by the Constitution, is evidenced by the structure of the section and the necessities of the practical application of its provisions. The qualification as to alienage, color and race, is a parenthetical phrase in the clause penalizing different punishments "than are prescribed for \* \* \* citizens" and in the common use of language could refer only to the subject matter of the clause and not to that of the earlier one relating to the deprivation of rights to which it makes no reference in terms. \* \* \*

So interpreted § 20 applies to deprivation of the constitutional rights of qualified voters to choose representatives in Congress. The generality of the section made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like.

We do not discuss the application of § 20 to deprivations of the right to equal protection of the laws guaranteed by the Fourteenth Amendment, a point apparently raised and discussed for the first time in the Government's brief in this Court. The point was not specially considered or decided by the court below, and has not been assigned as error by the Government. Since the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates, we are not called upon to construe the indictment in order to raise a question of statutory validity or construction which we are alone authorized to review upon this appeal. Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

[MR. JUSTICE DOUGLAS dissented, joined by MR. JUSTICE BLACK and MR. JUSTICE MURPHY. They thought that § 19 should not be construed to apply to primaries.]

#### NOTES

1. The power of Congress to make it a federal crime for officers of an election at which members of Congress are voted for to violate any duty imposed upon them by state or federal law was upheld under Art. I, § 4, cl. 1, in *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717 (1880). And even though suffrage qualifications are fixed by state law, the right of a legally qualified elector to vote for members of Congress is a right derived from the Constitution which may be accorded protection by federal law. It was upon this theory, in *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. 152 (1884), that the conviction of private individuals for maltreating a Negro while exercising his right to vote for a member of Congress was sustained under the conspiracy provision of the

Civil Rights Acts as a valid exercise of the power to enforce the Fifteenth Amendment by appropriate legislation. In *United States v. Saylor*, 322 U. S. 385, 88 L. ed. 1341, 64 Sup. Ct. 1101 (1944) the conspiracy provision was held to have been violated where election officials stuffed the ballot box at an election of a United States Senator in Kentucky.

2. The Democratic party of Alabama, exercising a state-delegated authority, closed the official primary to any candidate for presidential elector who refused to pledge himself to support any candidate named by the Democratic National Convention. The Supreme Court of Alabama held the pledge requirement to be a violation of the Twelfth Amendment since it restricted the freedom of a federal elector to vote in the Electoral College. Reversing this judgment, the Supreme Court of the United States, in an opinion by Mr. Justice Reed, held that the Twelfth Amendment does not demand absolute freedom for the elector to vote his own choice, uninhibited by a pledge, and that, "even if such promises of candidates for the Electoral College are legally unenforceable because violative of an assumed constitutional freedom of the elector" it did not follow that the pledge requirement was unconstitutional. Justices Jackson and Douglas dissented on the ground that under the Twelfth Amendment the electors were intended to be free agents and exercise an independent judgment as to the men best qualified for the nation's highest offices. Justices Black and Frankfurter did not participate. *Ray v. Blair*, 343 U. S. 214, 96 L. ed. 894, 72 Sup. Ct. 654 (1952).

### SMITH v. ALLWRIGHT.

Supreme Court of the United States, 1944.

321 U. S. 649, 88 L. ed. 987, 64 Sup. Ct. 757, 151 A. L. R. 1110.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of \$5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate §§ 31 and 43 of Title 8 of the United States Code, in that petitioner was deprived of rights secured by §§ 2 and 4 of Article I and the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The suit was filed in the District Court of the United States for the Southern District of Texas which had jurisdiction under Judicial Code § 24, subsection 14, 28 U. S. C. § 41 (14).

The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*, 295 U. S. 45. We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States v. Classic*, 313 U. S. 299.

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be deemed a qualified elector." Constitution of Texas, Article VI, § 2; Vernon's Civil Statutes (1939 ed.) Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic Party was required to hold the primary which was the occasion of the alleged wrong to petitioner. A summary of the state statutes regulating primaries appears in the footnote. These nominations are to be made by the qualified voters of the party. Art. 3101.

The Democratic Party of Texas is held by the Supreme Court of that state to be a "voluntary association," *Bell v. Hill*, 123 Tex. 531, 534, 74 S. W. (2d) 113, protected by § 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the state except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the State may regulate such elections by proper laws." That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances, be conferred upon a State or governmental agency." Page 546. *Cf. Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180.

The Democratic party on May 24, 1932, in a State Convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations." It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a state from making or enforcing any

law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgment by a state of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth, or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. No appearance for respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as amici curiae, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon v. Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev. Stat. 1925) declared "in no event shall a Negro be eligible to participate in a Democratic party primary election in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought a suit for damages against the election officers under R. S. §§ 1979 and 2004, the present §§ 43 and 31 of Title 8, U. S. C., respectively. It was urged to this Court that the denial of the franchise to Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The legislature of Texas reenacted the article but gave the State Executive Committee of the party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary and again brought suit for damages by virtue of § 31, Title 8, U. S. C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be State action and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee

operated as representative of the State in the discharge of the State's authority. *Nixon v. Condon*, 286 U. S. 73. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 286 U. S. 84, 85.

In *Grove v. Townsend*, 295 U. S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon v. Condon*, *supra*, in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the state. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the state need have no concern," *loc. cit.* 295 U. S. at 55, while for a state to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendments.

Since *Grove v. Townsend* and prior to the present suit, no case from Texas involving primary elections has been before the Court. We did decide, however, *United States v. Classic*, 313 U. S. 299. We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, 313 U. S. at 316, 317, "where the primary is by law made an integral part of the election machinery." 313 U. S. at 318. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code, 18 U. S. C. §§ 51, 52. Thereby corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of Federal suffrage secured by the Constitution in primary as in general elections. 313 U. S. at 323. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of Federal officials. By this decision the doubt as to whether or not such primaries were a part of "elections" subject to Federal control, which had remained unanswered since *Newberry v. United States*, 256 U. S. 232, was erased. The *Nixon* cases were decided under the equal protection clause of the Fourteenth Amendment without a

determination of the status of the primary as part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the Classic case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the Classic case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. Classic bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state. When *Grovey v. Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U. S. at 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in Classic as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey v. Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. \* \* \*

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U. S. 314; *Myers v. Anderson*, 238 U. S. 368; *Ex parte Yarbrough*, 110 U. S. 651, 663 *et seq.* By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution

the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell v. Hill*, supra, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land \* \* \*." Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955 \* \* \* Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the

Texas primary follows substantially that of Louisiana, with the exception that in Louisiana the state pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the state or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgment should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn v. United States*, 238 U. S. 347, 362.

The United States is a constitutional democracy. Its organic law grants to all its citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson*, 307 U. S. 268, 275.

The privilege of membership in a party may be, as this Court said in *Grove v. Townsend*, 295 U. S. 45, 55, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying, contrary to the recent decision in *Grove v. Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgment by a state of a citizen's right to vote. *Grove v. Townsend* is overruled.

Judgment reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

[MR. JUSTICE ROBERTS dissented in an opinion which is omitted here.]

## NOTES

1. The principal case is discussed in Cushman, *The Texas "White Primary" Case—Smith v. Allwright*, 30 *Corn. L. Q.* 66 (1944); Hastie, *Appraisal of Smith v. Allwright*, 5 *Lawyers Guild Rev.* 65 (1945). For discussion of the earlier cases see Evans, *Primary Elections and the Constitution*, 32 *Mich. L. Rev.* 451 (1934). For the effect of the decision upon Negro suffrage in the Southern states, see Weeks, *The White Primary: 1944-1948*, 42 *Am. Pol. Sci. Rev.* 500 (1948); Note, 47 *Col. L. Rev.* 76 (1947). For the historical background of the "white primary", see McGovney, *The American Suffrage Medley* (1949), 99-104; Key, *Southern Politics* (1949), 619-24.

2. In an effort to circumvent the holding in the principal case, South Carolina repealed all statutes regulating primary elections, thus attempting to transform the Democratic party of the state into a "private voluntary association of individuals" which could exclude Negroes from primaries by "club rules." In a class suit brought by a Negro plaintiff to enjoin party officials from refusing primary ballots to Negroes, the federal district court, granting the injunction, held that the state Democratic primary still remained the only effective agency for the selection of federal and other officials and that Negroes could not, in conformity with *Smith v. Allwright*, be barred from participation therein. This decision was affirmed by the United States Court of Appeals, the opinion of Judge Parker saying: "The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people." *Rice v. Elmore*, 165 F. (2d) 387 (C. C. A. 4th 1947), cert. den., 333 U. S. 875, 92 L. ed. 1151, 68 Sup. Ct. 905 (1948).

A later attempt to maintain a "white primary" in South Carolina by organizing the Democratic party into clubs open only to whites, and providing that qualified Negro electors were also entitled to vote in the primaries if they presented their general election certificates and took an oath that they believed in the social and educational separation of races and opposed a federal Fair Employment Practices Act, was defeated in *Baskin v. Brown*, 174 F. (2d) 391 (C. A. 4th 1949), where the court affirmed the issuance of a decree enjoining the use of these restrictive devices.

3. *Terry v. Adams*, 345 U. S. 461, 97 L. ed. 1152, 73 Sup. Ct. 809 (1953) raised the question whether the Fifteenth Amendment was violated by the practice of excluding Negroes from voting in the primaries of a Texas county political organization known as the Jaybird Democratic Association. The membership of the organization was limited to whites whose names appeared on the official list of county voters. Apart from excluding Negroes, the voting qualifications were identical with those prescribed by Texas laws. The organization's primaries were held prior to the primaries of the Democratic party and the names of its nominees were put on the ballot on the Democratic primary without indication that they had been nominated by the organization. While persons not so nominated were free to enter the official primaries, the organization's nominees usually won without opposition in these primaries and the general elections that followed. The admitted purpose of the organization was to deny Negroes any voice in the election of county officials. Against the contention that the Jaybird organization

was not a political party but a self-governing voluntary club, whose activities were not state action, the Supreme Court, in an eight-to-one decision, held that these discriminatory practices were prohibited by the Fifteenth Amendment. Three opinions were written by the majority justices, each expressing a different point of view. Mr. Justice Minton dissented on the ground that the state's failure to prevent individuals from doing what they had a right to do did not amount to state action.

CHAPTER X  
CONSTITUTIONAL LIMITATIONS: PROHIBITION OF SLAVERY  
AND INVOLUNTARY SERVITUDE

BAILEY v. ALABAMA.

Supreme Court of the United States, 1911.  
219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. 145.

MR. JUSTICE HUGHES delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of conviction in the Montgomery city court. The statute upon which the conviction was based is assailed as in violation of the Fourteenth Amendment of the Constitution of the United States upon the ground that it deprived the plaintiff in error of his liberty without due process of law and denied him the equal protection of the laws, and also of the Thirteenth Amendment, and of the act of Congress providing for the enforcement of that Amendment, in that the effect of the statute is to enforce involuntary servitude by compelling personal service in liquidation of a debt.

The statute in question is § 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907. \* \* \* The section, thus amended, reads as follows:

"Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than \$300, one half of said fine to go to the county and one half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than \$300, one half of said fine to go to the county and one half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service, or to cultivate such land, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord or defraud him. That all laws and parts

of laws in conflict with the provisions hereof be and the same are hereby repealed."

There is also a rule of evidence enforced by the courts of Alabama which must be regarded as having the same effect as if read into the statute itself, that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify "as to his uncommunicated motives, purpose, or intention." *Bailey v. State*, 161 Ala. 77, 78, 49 So. 886. \* \* \*

We at once dismiss from consideration the fact that the plaintiff in error is a black man. While the action of a state, through its officers charged with the administration of a law fair in appearance, may be of such a character as to constitute a denial of the equal protection of the laws (*Yick Wo v. Hopkins*, 118 U. S. 356, 373) such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. \* \* \*

But the refusal or failure to perform the service, without just cause, constitutes the breach of the contract. The justice of the grounds of refusal or failure must, of course, be determined by the contractual obligation assumed. Whatever the reason for leaving the service, if, judged by the terms of the contract, it is insufficient in law, it is not "just cause." The money received and repayable, nothing more being shown, constitutes a mere debt. The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the *prima facie* case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction.

It is no answer to say that the jury must find, and here found, that a fraudulent intent existed. The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding. Had it not been for this statutory presumption, supplied by the amendment, no one would be heard to say that Bailey could have been convicted. \* \* \*

We are not impressed with the argument that the Supreme Court of Alabama has construed the amendment to mean that the jury is not controlled by the presumption, if unrebutted, and still may find the accused not guilty. That court, in its opinion, said: "Again, it must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the contrary, with

such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence." 161 Ala. 78, 49 So. 886.

But the controlling construction of the statute is the affirmance of this judgment of conviction. It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this light that the validity of the statute must be determined. \* \* \*

While, in considering the natural operation and effect of the statute, as amended, we are not limited to the particular facts of the case at the bar, they present an illuminating illustration. We may briefly restate them. Bailey made a contract to work for a year at \$12 a month. He received \$15, and he was to work this out, being entitled monthly only to \$10.75 of his wages. No one was present when he made the contract but himself and the manager of the employing company. There is not a particle of evidence of any circumstance indicating that he made the contract or received the money with any intent to injure or defraud his employer. On the contrary, he actually worked for upwards of a month. His motive in leaving does not appear, the only showing being that it was without legal excuse and that he did not repay the money received. For this he is sentenced to a fine of \$30 and to imprisonment at hard labor, in default of the payment of the fine and costs, for 136 days. Was not the case the same in effect as if the statute had made it a criminal act to leave the service without just cause and without liquidating the debt? To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey.

Consider the situation of the accused under this statutory presumption. If, at the outset, nothing took place but the making of the contract and the receipt of the money, he could show nothing else. If there was no legal justification for his leaving his employment, he could show none. If he had not paid the debt, there was nothing to be said as to that. The law of the state did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay.

It is said that we may assume that a fair jury would convict only where the circumstances sufficiently indicated a fraudulent intent. Why should this be assumed in the face of the statute and upon this record?

In the present case the jury did convict, although there is an absence of evidence sufficient to establish fraud under the familiar rule that fraud will not be presumed, and the obvious explanation of the verdict is that the trial court, in accordance with the statute, charged the jury that refusal to perform the service, or to repay the money, without just cause, constituted *prima facie* evidence of the commission of the offense which the statute defined. That is, the jury were told in effect that the evidence, under the statutory rule, was sufficient, and hence they treated it as such. There is no basis for an assumption that the jury would have acted differently if Bailey had worked for three months, or six months, or nine months, if in fact his debt had not been paid. The normal assumption is that the jury will follow the statute, and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes. \* \* \*

We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

This Court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Fong Yue Ting v. United States*, 149 U. S. 698, 749. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. \* \* \*

In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the Thirteenth Amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

The Thirteenth Amendment provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Pursuant to the authority thus conferred, Congress passed the act of March 2, 1867, chap. 187, 14 Stat. at L. 546, the provisions of which are now found in §§ 1990 and 5526 of the Revised Statutes, as follows:

"Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return, of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both." \* \* \*

Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid. And in this explicit and comprehensive enactment, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained, or enforced.

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is

created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. \* \* \*

The act of Congress, nullifying all state laws by which it should be attempted to enforce the "service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The Thirteenth Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt. \* \* \*

What the state may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question \* \* \* and we conclude that § 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received prima facie evidence of the commission of the crime which the section defines, is in conflict with the Thirteenth Amendment, and the legislation authorized by that Amendment, and is therefore invalid.

In this view it is unnecessary to consider the contentions which have been made under the Fourteenth Amendment. As the case was given to the jury under instructions which authorize a verdict in accordance with the statutory presumption, and the opposing instructions requested by the accused were refused, the judgment must be reversed.

Reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES, dissenting: \* \* \*

The Thirteenth Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. For it certainly would affect the terms of the bargain unfavorably for the laboring man if it were understood that the employer could do nothing in case the laborer saw fit to break his

word. But any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine. If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor; and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right; it does not make the laborer a slave.

But if a fine may be imposed, imprisonment may be imposed in case of a failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. \* \* \* If work in a jail is not condemned in itself, without regard to what the conduct is it punishes, it may be made a consequence of any conduct that the state has power to punish at all. I do not blink the fact that the liability to imprisonment may work as a motive when a fine without it would not, and that it may induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective. \* \* \*

I think it a mistake to say that this statute attaches its punishment to the mere breach of a contract to labor. It does not purport to do so; what it purports to punish is fraudulently obtaining money by a false pretense of an intent to keep the written contract in consideration of which the money is advanced. \* \* \* But the import of the statute is supposed to be changed by the provision, that a refusal to perform, coupled with a failure to return the money advanced, shall be *prima facie* evidence of fraudulent intent. I agree that if the statute created a conclusive presumption, it might be held to make a disguised change in the substantive law. *Keller v. United States*, 213 U. S. 138, 150. But it only makes the conduct *prima facie* evidence,—a very different matter. Is it not evidence that a man had a fraudulent intent if he receives an advance upon a contract over night and leaves in the morning? I should have thought that it very plainly was. Of course, the statute is in general terms, and applies to a departure at any time without excuse or repayment, but that does no harm except on a tacit assumption that this law is not administered as it would be in New York, and that juries will act with prejudice against the laboring man. \* \* \*

To sum up, I think that obtaining money by fraud may be made a crime as well as murder or theft; that a false representation, expressed or implied, at the time of making a contract of labor, that one intends to perform it, and thereby obtaining an advance, may be declared a case of fraudulently obtaining money as well as any other; that if made

a crime it may be punished like any other crime; and that an unjustified departure from the promised service without repayment may be declared a sufficient case to go to the jury for their judgment; all without in any way infringing the Thirteenth Amendment or the statutes of the United States.

MR. JUSTICE LURTON concurs in this dissent.

#### NOTES

1. In *Taylor v. Georgia*, 315 U. S. 25, 86 L. ed. 615, 62 Sup. Ct. 415 (1942) a like statute was held invalid. In *Pollock v. Williams*, 322 U. S. 4, 88 L. ed. 1095, 64 Sup. Ct. 792 (1944) the defendant pleaded guilty to violation of a statute similar to those of Alabama and Georgia. Against the contention of the state that the prima facie evidence provision should be excluded from consideration because in fact it played no part in producing the plea of guilty, the court, in reversing the conviction, made its position clear: "It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section. The latter in a different context might not be invalid. Indeed, we have sustained the power of the state to enact an almost identical presumption of fraud, but in transactions that did not involve involuntary labor to discharge a debt. *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U. S. 119, 71 L. ed. 569, 47 Sup. Ct. 308." The court took the view that where in the same substantive context the state threatens by statute to convict on a presumption, its inherent coercive power is such that it is equally useful in attempts to enforce involuntary service in discharge of a debt, and the whole is invalid.

2. The Thirteenth Amendment is not merely a limitation upon governmental action but contains an absolute prohibition of slavery and involuntary servitude, whether brought about by acts of private individuals or state or federal legislation. In *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. 429 (1905), sustaining the federal statute prohibiting peonage in any state or territory of the United States, the court said: "This Amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the states; but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress power to enforce this prohibition by appropriate legislation. The differences between the Thirteenth and subsequent amendments have been so fully considered by this court that it is enough to refer to the decisions."

3. Historical considerations have been said to be the basis for holding valid certain types of compulsory service. Thus sailors may be compelled to perform their labor contracts. *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. 326 (1897) (holding valid a federal statute providing that seamen who desert their vessels may be arrested and forcibly returned for service, and providing a punishment by imprisonment for desertion). The government may require compulsory military service from all able-bodied citizens. *Selective Draft Law Cases*, 245 U. S. 366, 62 L. ed. 349, 38 Sup. Ct. 159, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856 (1918). States may require able-bodied male persons over twenty-one and under forty-five years of age to work on the public roads for six days in each year, or in lieu thereof to furnish a substitute or pay three dollars per day. *Butler v. Perry*, 240 U. S. 328, 60 L. ed. 672, 36 Sup. Ct. 258 (1916).

CHAPTER XI  
CONSTITUTIONAL LIMITATIONS: LAWS IMPAIRING  
OBLIGATIONS OF CONTRACTS

FLETCHER v. PECK.

Supreme Court of the United States, 1810.  
6 Cranch 87, 3 L. ed. 162.

[See the statement of facts, ante, p. 21. The following part of the opinion was addressed to the issue raised by the pleading with reference to the fourth covenant.]

MR. CHIEF JUSTICE MARSHALL. \* \* \* In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction.  
\* \* \*

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the

public, be in the nature of the legislative power, is well worthy of serious reflection. \* \* \*

The Constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contract, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. \* \* \*

The state legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by

which a man's estate, or any part of, it shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant? \* \* \*

It is, then, the unanimous opinion of the Court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. \* \* \*

Judgment affirmed.

[MR. JUSTICE JOHNSON delivered a separate opinion dissenting in part from the opinion of the Court.]

#### NOTES

1. For analysis of the cases arising under the impairment of contracts clause, consult: Wright, *The Contract Clause of the Constitution* (1938); Note, *The Contract Clause of the Federal Constitution*, 32 Col. L. Rev. 476 (1932), 2 *Selected Essays on Constitutional Law* (1938), 301; Merrill, *Application of the Obligation of Contract Clause to State Promises*, 80 U. of Pa. L. Rev. 639 (1932), 2 *Selected Essays on Constitutional Law* (1938), 319; Kauper, *What is a Contract Under the Contracts Clause of the Federal Constitution*, 31 Mich. L. Rev. 187 (1933); Hale, *The Supreme Court and the Contract Clause*, 57 Harv. L. Rev. 512, 621, 852 (1944).

2. Concurring in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 572-573, 9 L. ed. 773 (1837), Mr. Justice McLean said: "A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement, sanctioned by moral and legal principles. \* \* \* If it had not been otherwise laid down in the case of *Fletcher v. Peck*, 6 Cranch 125, I should have doubted whether the inhibition did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which this provision was intended to guard, as from the language of the provision itself. An executed contract is the evidence of a thing done; and it would seem, does not necessarily impose any duty or obligation on either party to do any act or thing. If a state convey land which it had previously granted, the second grant is void; not, it would seem to me, because the second grant impairs the obligation of the first, for in fact it does not impair it; but because, having no interest in the thing granted, the state could convey none. The second grant would be void in this country, on the same ground that it would be void in England, if made by the King. This is a principle of the common law; and

it is as immutable as the basis of justice. It derives no strength from the above provision of the Constitution; nor does it seem to me to come within the scope of that provision."

3. In *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547 (1823) Kentucky laws intended to protect land titles by requiring the claimant of land to pay the value of improvements made in good faith by an occupant as a condition of being put into possession, were held to violate a compact between Virginia and Kentucky at the time Kentucky became a state and hence the contract clause of the Constitution.

4. In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629 (1819) the Supreme Court held that a grant by the Crown in 1769, to twelve trustees, of the privilege of incorporation, with power to appoint successors, conferring upon them all usual corporate powers to control and manage the college, was protected by the contract clause against state legislative impairment. It also held that a prohibited impairment would result if effect were given to certain statutes of New Hampshire, enacted in 1816. The statutes attempted to change the name to Dartmouth University, to increase the number of trustees to twenty-one, and to create an additional board of twenty-five, called a board of overseers, which would have power to veto all proceedings of the trustees relating to the appointment or removal of the president, professors and other permanent officers, to the establishment of colleges in the university or professorships and the erection of new buildings. The statutes attempted to make the president of the senate and the speaker of the house of representatives, of New Hampshire, and the Governor and Lieutenant-Governor of Vermont ex-officio members of the board of overseers, the other members of this board and the additional members of the board of trustees to be appointed by the state Governor and legislative council, of New Hampshire. The court therefore held that these statutes were inoperative because of the contract clause.

Chief Justice Marshall devoted a single paragraph of his long opinion to a finding that the facts gave rise to a contract. He said: "It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found."

Admitting that education could be made a function of government and public corporations created to discharge the function, the Chief Justice concluded that it was a private function when performed by private individuals and mere incorporation did not make the incorporated persons public officers; that a corporation could be a private one though it was created to perform a service to members of the public, and that this incorporated board of trustees was a private corporation, such conclusion being strongly impelled by the fact that the corporation's funds were derived from private sources. An argument of expediency was added. Sound policy did not require an interpretation that would subject trusts for education to legislative alteration but, on the contrary, prospective donors should be encouraged by giving them assurance that their arrangements for the management of the trusts would be respected.

On the issue as to whether the legislation violated the contract clause, Marshall said: "On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management

and application of the funds of this eleemosynary institution which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given, they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given."

Justices Washington and Story delivered concurring opinions. Justice Johnson concurred for the reasons stated by the Chief Justice. Justice Livingston concurred with all the opinions, and Justice Duval dissented.

For a graphic account of the Dartmouth College case in its historic setting see 4 *Beveridge, The Life of John Marshall* (1919), 220-231; see also, 1 *Warren, The Supreme Court in United States History* (1922), 474-492.

The consequences of the decision have long since been obviated. The states were not slow to adopt the suggestion in Justice Story's concurring opinion that a reservation of the statutory power to alter or repeal corporate charters would remove the constitutional objection and protect the states from the undesirable effects of the decision. This power is in some states reserved in the state constitution; in others it is inserted in the law under which corporate charters are granted. For a discussion of this power see Note, 31 *Col. L. Rev.* 1163 (1931), 2 *Selected Essays on Constitutional Law* (1938), 352.

5. Marriage is not a contract protected by the contract clause, and an act of a state or territorial legislature dissolving a marriage does not violate this clause. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723 (1888).

6. A public "officer" though elected or appointed for a definite term at a salary then fixed by law is not in a contract relation, and hence a legislative abolition of an office or the abolition or decrease of the salary, within the term, is not prohibited by the contract clause. *Butler v. Pennsylvania*, 10 *How.* 402, 13 L. ed. 472 (1850). However, many state "employees" stand in a contract relation and are protected. *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302 (1880); and see *Cramer v. New Brunswick Water Comrs.*, 57 N. J. Law 478, 31 *Atl.* 384 (1895). An "officer" has a contractual claim for salary accrued which is protected against impairment by state legislation. *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. 329 (1885); *Robertson v. Miller*, 276 U. S. 174, 72 L. ed. 517, 48 Sup. Ct. 266 (1928).

7. The obligation of a judgment based upon a tort is not an "obligation of contract," notwithstanding that a judgment is sometimes classified as a quasi-contract. *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. 211 (1883); *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. 763 (1888). A statutory duty to pay interest on a judgment may be abolished by statute even as to an existing contract judgment. *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. 54 (1892). So a purely statutory right to compensation from a city for damages to property is not protected

against impairment by subsequent legislation. *Crane v. Hahlo*, 258 U. S. 142, 66 L. ed. 514, 42 Sup. Ct. 214 (1922).

8. Statutes creating municipal corporations are not contracts. *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. 534, 29 A. L. R. 1471 (1923).

9. Since the direction of corporate affairs is vested in boards of directors, the question has frequently arisen as to how far the state may go, under its reserved power to alter, amend or repeal grants of corporate authority, in enacting legislation which interferes with corporate internal affairs. *Looker v. Maynard*, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. 21 (1900) sustained the power of a state to provide that stockholders should have the power to cumulate their votes in the elections of directors, the court saying that the reserved power extends to any alteration or amendment of a charter "which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." See Note, *Power of the State to Alter Corporate Charters*, 31 Col. L. Rev. 1163 (1931), 2 Selected Essays on Constitutional Law (1938), 352.

10. A corporation was chartered by the state in 1866, the state reserving a right to alter or repeal the charter. In 1887 a city granted the corporation a franchise for thirty years to supply the inhabitants with water, contracting to renew for another thirty years or to buy the plant by a specified mode of appraisal. In 1911 the legislature declared all such franchises "indeterminate permits." After 1917 the company sued the city for specific performance of its promise to renew the franchise or buy the plant. The state Supreme Court construed "indeterminate permit" in the act of 1911 to mean indeterminate as to time, not limited to thirty years or any other period, and held that thus altered the franchise did not expire in 1917 and hence no duty on the part of the city to renew or buy the plant could accrue. The Supreme Court of the United States reversed, holding that the state's reservation of a power to alter or repeal the charter did not include a power to change the contract made between the city and the company without the latter's consent. *Superior Water, Light & Power Co. v. Superior*, 263 U. S. 125, 68 L. ed. 204, 44 Sup. Ct. 82 (1923).

### FLEMING v. FLEMING.

Supreme Court of the United States, 1924.  
264 U. S. 29, 68 L. ed. 547, 44 Sup. Ct. 246.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Iowa. The suit was begun in Polk County District Court by Anna B. Fleming, widow of Charles Fleming, against three brothers of her husband, one of whom had become his administrator, to secure her dower rights under the state statute in the share of her husband in the property of a partnership of the four brothers, in the business of soliciting and placing life insurance. The defendants' claim was that Charles lost all interest in the partnership upon his death, that by virtue of three contracts the property passed to the survivors, and the partnership of the three continued in possession and title free from any claim by heirs, next of kin, or the

widow of Charles. The Supreme Court of Iowa held that these contracts constituted a contract by each partner to make a will to his survivors, were testamentary in character, and were avoided by § 3376 of the Code of Iowa, providing that as between husband and wife the survivor's share cannot be affected by any will of the spouse without previous consent of the survivor.

It is assigned for error that in this ruling the Supreme Court of the state reversed its former rulings, under which such a contract of partnership had been held to be valid and not avoided by § 3376 or any other section of the Code; that on the faith of these rulings, the partnership contracts herein had been entered into, and that the new construction of the statute was an impairment of the contracts of partnership in violation of Article I, § 10, of the federal Constitution. This objection was made in the Supreme Court of the state on the application for a second rehearing, and the court held in its opinion that the point was not well taken because no prior decisions had in fact been overruled. This is a sufficient consideration of the point by the state Supreme Court before its judgment, to justify an assignment of error raising the federal question, if in fact and in law it be one.

In *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, we had occasion to consider the same issue. After a somewhat full examination, we held that, by a score of decisions of this court, a judicial impairment of a contract obligation was not within § 10, Article I, of the Constitution, since the inhibition was directed only against impairment by legislation, and that such judicial action presented no federal question of which this court could take jurisdiction on a writ of error from a state court.

It is urged upon us that the impairment here is legislative, in that the case turned on the effect of § 3376 of the Iowa Code; that the subsequent judicial construction of it became part of the statute and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed, before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power by change in construction to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the *Flanagan Case*.

For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial federal question, and dismiss the writ of error for lack of jurisdiction.

Writ of error dismissed.

## NOTES

1. In *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451-452, 68 L. ed. 382, 44 Sup. Ct. 197 (1924), Chief Justice Taft, speaking for the court, said: "It has been settled by a long line of decisions, that the provision of § 10, Article I, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. \* \* \* However, the fact that it has been necessary for this court to decide the question so many times is evidence of persistent error in regard to it. Among the cases relied on to sustain the error are *Gelpcke v. Dubuque*, 1 Wall. 175; *Butz v. Muscatine*, 8 Wall. 575; *Douglas v. Pike County*, 101 U. S. 677; *Anderson v. Santa Anna Twp.*, 116 U. S. 356; *German Savings Bank v. Franklin County*, 128 U. S. 526; *Rowan v. Runnels*, 3 How. 134; and *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558. These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by the Supreme Court of a state prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts, exercising jurisdiction between citizens of different states, held themselves free to decide what the state law was, and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third article of the Constitution, they were empowered to do. \* \* \* In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law, but where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was. Had such cases been decided by the state courts, however, and had it been attempted to bring them here by writ of error to the state Supreme Court, they would have presented no federal question, and this court must have dismissed the writs for lack both of power and jurisdiction. This is well illustrated by the cases of *Gelpcke v. Dubuque*, 1 Wall. 175, and *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511. In the former, bonds sued on in the Circuit Court of the United States, were collected under judgment of this court. In the latter, like bonds sued on in a state court were held invalid, and a writ of error to the state Supreme Court was dismissed."

2. "This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law." *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 638-639, 56 L. ed. 924, 32 Sup. Ct. 577 (1912).

3. The scope of the contract clause has been restricted by the distinction drawn between "impairment of the obligation of the contract" and "breach of the contract." The result seems to be that the protection of the clause is virtually withdrawn from those executory state contracts in which the state is acting in the capacity of an individual entrepreneur. If a contract of this type were made between private individuals, the injured party in most cases would

be denied specific performance, and the Supreme Court has apparently taken the view that when the state is a party the individual will not be unfairly dealt with if he is left to such remedies for the breach as the state may see fit to grant him in its courts or by appropriate legislative action. In *Hays v. Seattle*, 251 U. S. 233, 64 L. ed. 243, 40 Sup. Ct. 125 (1920) the plaintiff contracted with the State of Washington to excavate certain waterways. He was to use the excavated material to fill in certain submerged lands and was to have a lien on this land for the costs of the work. After seventeen years of delay in getting the work under way, the state passed a law abandoning the excavation scheme and vesting the title to the land in the Port of Seattle. Plaintiff sought to enjoin the enforcement of the statute. The bill was dismissed. In affirming this judgment, the Supreme Court, through Justice Pitney, said: "Upon the first constitutional point, it is important to note the distinction between a statute that has the effect of violating or repudiating a contract previously made by the state and one that impairs its obligation. Had the legislature of Washington, pending performance or after complete performance by complainant, passed an act to alter materially the scope of his contract, to diminish his compensation, or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation. The legislation in question had no such purpose or effect. It simply, after seventeen years of delay without substantial performance of the contract, provided that the project should be abandoned and title to the public lands turned over to the municipality."

### LARSON v. SOUTH DAKOTA.

Supreme Court of the United States, 1929.

278 U. S. 429, 73 L. ed. 441, 49 Sup. Ct. 196.

[Appellant, Larson, sued the State of South Dakota in the state Supreme Court as permitted by § 2109, South Dakota Revised Code of 1919, for damages for the destruction of his ferry franchise on the Missouri River. In 1916 and 1921 two boards of county commissioners acting under a state statute granted to Larson leases or ferry franchises to operate a ferry across the Missouri River for toll. He accepted the franchises and equipped the ferry with boats and landings. The statute provided that when "any ferry lease has been granted, no other lease shall be granted within a distance of two miles" from the ferry landing. Under acts of the legislature the state, during the years 1923 and 1924, built a free bridge across the river less than two miles from Larson's ferry landing. Larson alleged that this free bridge totally destroyed his business, his ferry franchises, and made his investment worthless, damaging him to the amount of \$44,000, for which he asked judgment. The court sustained a demurrer to this complaint and this appeal was taken.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

The exclusive ferry leases were contracts between the State and the petitioner. The Binghamton Bridge, 3 Wall. 51. Was the building of the bridge a breach of them?

The Supreme Court of the State has had the meaning of "exclusive ferry franchise" before it twice before this case, in *Nixon v. Reid*, 8

S. D. 507, and in *Chamberlain Ferry & Cable Bridge v. King*, 41 S. D. 246; but these cases did not require consideration of the effect of the term as applied to anything but ferries. The court said on that subject in the present case:

"All that is contemplated by the statute and all that was granted by the plaintiff's leases was the right to operate a ferry together with a prohibition upon the granting boards from granting other ferry leases within the granted area during the period. \* \* \* Nowhere in the statute can be found or implied a provision that the state was binding itself not to construct, nor authorize the construction of, a bridge across the river within the four mile area, or not to permit carriage by aviation across it. The fair and reasonable construction of the statute is that it refers solely to transportation by ferry."

Coming from the State Supreme Court, this language is very persuasive of the meaning of the statute and would indicate that in its view the building of a bridge was not a breach of the ferry contracts.

The petitioner relies on the contract clause of the federal Constitution, and is not prevented from invoking from this Court an independent consideration of what the contract means, and whether by a proper construction, the building of a bridge impairs its obligation. \* \* \*

We must therefore treat the question as an open one and determine as an independent matter what the parties must be held to have had in mind in the use of the term "exclusive lease."

The chapter of the Revised Code of the state immediately preceding that which directs the letting and granting of exclusive ferry leases provides for the building of bridges over the rivers of South Dakota. This close relation of the chapters suggests that if bridges were intended to be forbidden by the contract, the parties would have been likely to mention a bridge as a breach. But there is no mention of a bridge in the statute or contract dealing with ferries.

On the other hand, it is argued that it was so well understood by everyone, including the parties, that the erection of a bridge in the forbidden area would destroy the value of the ferry leases, and so defeat the real object of the leases, that an implication necessarily arises that a bridge would be a breach of the leases. \* \* \*

We think, however, a broader question arises in the proper construction of a public grant like this. The leading case on the subject in Federal jurisprudence is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 547. In that case the legislature of Massachusetts incorporated a company to build a bridge over the Charles River where a ferry stood, granting it tolls. Years after, the legislature incorporated another company for the erection of another bridge within 800 feet of the original one. The new bridge was to become free after a few years, and at the time of the litigation it had become actually free. The Charles River Bridge was deprived of the tolls and its value was destroyed. Its proprietors filed a bill against the proprietors of the Warren

Bridge, for an injunction against the use of the bridge as an act impairing the obligations of a contract and repugnant to the Constitution of the United States. The Supreme Court of Massachusetts dismissed the bill and the case was brought by error to this Court, which affirmed the judgment of the Massachusetts court. The principle of the case is that public grants are to be strictly construed, that nothing passes to the grantee by implication. \* \* \*

Chief Justice Taney, delivering the opinion in the Charles River Bridge case, said [p. 547]:

"But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its powers of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear.'"

The same principle is declared in *Fanning v. Gregoire*, 16 How. 524, 534; *Wright v. Nagle*, 101 U. S. 791, 796; *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 293, and *Williams v. Mingo*, 177 U. S. 601, 603. Speaking for the Court in the last case Mr. Justice Brewer said:

"A contract binding the state is only created by clear language and is not to be extended by implication beyond the terms of the statute. *Fanning v. Gregoire*, 16 How. 524, is in point and decisive."

The cases above cited are not exactly on all fours with the specific issue presented here, but they serve to show with great emphasis the necessity for one who relies upon a public grant as a basis for a private right, to bring it expressly within the grant or statute. \* \* \*

There is some conflicting authority on the main question. \* \* \* But all of these cases are distinguishable in that the infringing bridge or ferry was established without legal authority, and there were other reasons such as obstruction to navigation, special statutes, or injury to tangible property which affected the decisions. \* \* \*

We can hardly say, therefore, from the weight of authority, that an exclusive grant of a ferry franchise, without more, would prevent a legislature from granting the right to build a bridge near the ferry.

Following the cases in this Court in its limited and careful construction of public grants, it is manifest that we must reach in this case the same conclusion.

The judgment of the Supreme Court of South Dakota is

Affirmed.

#### NOTE

1. The rule that grants by the state are to be construed strictly against the grantees and in favor of the public, and that nothing passes unless clearly granted, is a reflection of the contention early made that a state should not be permitted to part with its governmental powers by contract. It has become accepted doctrine of the Supreme Court and has frequently been applied to governmental grants of monopoly, special privileges, exemptions from taxation, exemption from rate regulation, power to lay tracks in public streets, to exercise the power of eminent domain, and the like, both in determining whether any such grant has been made and, if so, its scope and effect. See Note, *The Contract Clause of the Federal Constitution*, 32 Col. L. Rev. 476 (1932), 2 *Selected Essays on Constitutional Law* (1938), 301; Merrill, *Application of the Obligation of Contract Clause to State Promises*, 80 U. of Pa. L. Rev. 639 (1932), 2 *Selected Essays on Constitutional Law* (1938), 319.

"The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts." Mr. Justice Davis in *The Binghamton Bridge*, 3 Wall. 51, 75, 18 L. ed. 137 (1865).

#### PIQUA BRANCH OF STATE BANK OF OHIO v. KNOOP.

Supreme Court of the United States, 1853.

16 How. 369, 14 L. ed. 977.

[Error to the Supreme Court of Ohio. A statute of Ohio of 1845 authorized any five or more persons to incorporate for the purpose of carrying on a bank in the state, subject to the terms of the statute. The Piqua bank was organized in 1847 under this statute. By Act of March 21, 1851 the legislature enacted that banks incorporated under the laws of the state should pay a tax on their capital at the rate levied on other personal property. The bank refused to pay this tax, relying upon Sec. 60 of the statute of 1845, which provided that banks accepting and complying with the provisions of the Act should pay to the State six per cent of their semi-annual profits in lieu of all taxes to which they would otherwise be subject. In an action in a state court to collect the

tax, judgment went against the bank. On appeal the state Supreme Court affirmed the judgment and the bank took this writ of error.]

MR. JUSTICE M'LEAN delivered the opinion of the Court. \* \* \*

The idea that a state, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth; and so is the argument that if a State may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the taxpayer. The same may be said of every power where there is an exercise of judgment. \* \* \*

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the state. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the state, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the state and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized states where the common or the civil law is established. \* \* \*

There is no constitutional objection to the exercise of the power to make a binding contract by a state. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the state a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the state. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But

it is said the state cannot barter away any part of its sovereignty. No one ever contended that it could.

A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away state sovereignty.

It must be admitted that the state has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the state, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any state in the Union, which did not contain some exemptions from general taxation. \* \* \*

The argument is, and must be, that a sovereign state may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it. The Constitution of the Union, when first adopted, made states subject to the federal judicial power. Could a state, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no state should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the Supreme Court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual. This is a matter which can have no influence in deciding the legal question. The state did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as strong on the state, from the privileges granted and accepted, as if a bonus had been paid. \* \* \*

Judgment reversed.

[Brief concurring opinion of CHIEF JUSTICE TANAY, is here omitted. JUSTICES CATRON, DANIEL and CAMPBELL dissented.]

## NOTES

1. A contract between the Delaware Indians and the colony of New Jersey in which the colony authorized the establishment of an Indian reservation in consideration of the release by the Indian tribe of all claims to other lands in the colony, and provided that such reservation should not thereafter be subject to taxation, was ratified by the colonial legislature. In 1801 the Indians sold the reserved lands with the consent of the legislature. In 1804 a law was enacted repealing the tax exemption clause of the colonial statute. In *New Jersey v. Wilson*, 7 Cranch 164, 3 L. ed. 303 (1812) the repealer statute was held to violate the contract clause. The question of the power of a state to make a valid contract for an exemption from taxation was not discussed in Chief Justice Marshall's opinion but seems to have been assumed. The power was impliedly recognized in *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939 (1830), where, however, the court refused to imply a covenant not to levy special taxes on corporations in a charter incorporating a bank, Chief Justice Marshall stating that "the taxing power is of vital importance" and its abandonment "is never to be assumed."

Mr. Justice Miller, dissenting in *Washington University v. Rouse*, 8 Wall. 439, 443-444, 19 L. ed. 498 (1869) said: "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away the taxing power of the state. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society."

In *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495 (1869) the court held that a declaration in a special charter incorporating a charitable institution "that all property of said corporation shall be exempt from taxation" became contractually binding upon the state by the acceptance of the charter and acting under it. The court said: "It is settled by the repeated adjudications of this court, that a state may by contract based upon a consideration exempt the property of an individual or corporation from taxation, either for a specified period or permanently. And it is equally well-settled that the exemption is presumed to be on sufficient consideration and binds the state if the charter containing it is accepted."

The rule that a contract under which a state has purported to grant immunity from taxation is to be construed strictly against the grantee and in favor of the public, and that no claim of exemption will be sustained unless within the express letter or the necessary scope of the exemption clause, has been generally followed by the Supreme Court. *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. 230 (1897); *Hale v. Iowa State Board of Assessment and Review*, 302 U. S. 95, 82 L. ed. 72, 58 Sup. Ct. 102 (1937); *Atlantic Coast Line R. Co. v. Phillips*, 332 U. S. 168, 91 L. ed. 1977, 67 Sup. Ct. 1584, 173 A. L. R. 1 (1947). Legislative power to exempt property from taxation, whether by contract or other means, is now generally restricted by provisions of state constitutions. Cases involving tax exemption contracts are collected and discussed in the annotation in 82 L. ed. 82 (1938). See also the exhaustive annotation, *Tax Exemptions and the Contract Clause*, 173 A. L. R. 15 (1948).

2. A Masonic lodge was incorporated by the legislature of Louisiana in 1816. Its charter contained no tax exemption. In 1853 it acquired by deed land and a building to be used partly for a lodge hall and partly to produce income from rentals, the deed reciting a resolution of the lodge that it would use the income for the charitable purposes of the lodge. In 1855 the legislature enacted a law that this building, specifically mentioning it by description, should be exempt from state and parish taxes so long as it should be occupied by the lodge. The state constitution of 1879 prohibited exemptions of property of charitable

institutions used or leased for purposes of private or corporate profit or income. The Supreme Court of Louisiana held that so much of the building as was used to produce income thereby became taxable. The United States Supreme Court sustained this decision, saying that there was no consideration for the exemption in the act of 1855, and that in these circumstances the exemption was a "mere gratuity or bounty" which the state could withdraw at any time. *Grand Lodge v. New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. 523 (1897).

3. Three cases involving public school teachers illustrate the importance of statutory interpretation in applying the contract clause. In *Dodge v. Board of Education*, 302 U. S. 74, 82 L. ed. 57, 58 Sup. Ct. 98 (1937) statutes of Illinois were construed as putting public school teachers' retirement annuities on a non-contractual basis and therefore unprotected against legislative impairment. A like decision was made with respect to tenure of public school teachers in New Jersey. *Phelps v. Board of Education*, 300 U. S. 319, 81 L. ed. 674, 57 Sup. Ct. 483 (1937). But in *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 82 L. ed. 685, 58 Sup. Ct. 443, 113 A. L. R. 1482 (1938) an Indiana public school teachers' tenure law was interpreted as putting teachers' tenure on a contract basis and therefore constitutionally protected against impairment by subsequent state legislation.

### STONE v. MISSISSIPPI.

Supreme Court of the United States, 1880.

101 U. S. 814, 25 L. ed. 1079.

[Writ of error to the Supreme Court of Mississippi which had affirmed a judgment of a lower state court ousting Stone and others from a lottery charter granted by the state legislature in 1867, the decision being based upon provisions in a new state constitution adopted in 1879 and statutes of 1870, forbidding the operation of lotteries.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

\* \* \*

There can be no dispute but that under this form of words the Legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the State treasury \$5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of \$1,000 and "one-half of one per cent on the amount of receipts derived from the sale of certificates or tickets." If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way. \* \* \*

The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company,

defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Boston Beer Company v. Massachusetts*, 97 U. S. 25.

\* \* \*

The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause [the contract clause] protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. \* \* \*

Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the

terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal. \* \* \*

On the whole, we find no error in the record.

Judgment affirmed.

#### NOTES

1. A fertilizing company, incorporated in 1867 for the purpose of maintaining chemical works for the conversion of dead animals into agricultural fertilizer, established its works within limits designated in its charter at a point then three miles south of Chicago. At that time the surrounding country was swampy and uninhabited, but it later became the location of the village of Hyde Park. In *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036 (1878) it was held that the charter authorization did not prevent the enforcement of a subsequent ordinance prohibiting the transportation of offal of the slaughterhouses of Chicago through the streets of the village of Hyde Park. The court said: "The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the state, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them." Dissenting, Mr. Justice Strong said: "The police power of a state is no more sacred than its taxing power. We have held again and again that a state may by contract with one of its corporations bind itself not to tax the property of that corporation. If so, why may it not bind itself not to exercise its police power over certain employments?"

2. *Butchers' Union Slaughter House Co. v. Crescent City Live Stock Landing Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. 652 (1883) sustained a provision of the Constitution of Louisiana of 1879 and ordinances of the city of New Orleans of 1881 which threw open the slaughterhouse business in New Orleans to general competition, thereby abolishing the monopoly features of the charter of the Crescent City Company, granted by the state in 1869. Mr. Justice Miller, for the court, said: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

3. In *Texas & New Orleans R. Co. v. Miller*, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. 534 (1911) it was held that a state could validly repeal a provision in a railroad's charter exempting it from liability for the death of any employee.

#### NEW ORLEANS GAS-LIGHT CO. v. LOUISIANA LIGHT & HEAT PRODUCING & MFG. CO.

Supreme Court of the United States, 1885.

115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

[In 1875 the plaintiff succeeded to the ownership of a sole and exclusive right for fifty years, granted by the legislature, to lay pipes

in the streets of New Orleans and supply the inhabitants with gas. The state Constitution of 1879 purported to annul the monopolistic feature of this grant. The defendant was incorporated in 1881 under a state statute, and a franchise to supply the inhabitants with gas was sold to it by the city of New Orleans. The present appeal arose from a suit to enjoin defendant from exercising this franchise.]

MR. JUSTICE HARLAN delivered the opinion of the Court. \* \* \*

It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. \* \* \*

It is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the national Constitution. And this position is supposed by counsel to be justified by recent adjudications of this Court in which the nature and scope of the police power have been considered. \* \* \*

That the police power, according to its largest definition, is restricted in its exercise by the national Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts the obligations of which are fully protected against impairment by state enactments. \* \* \*

Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. \* \* \*

If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain

a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority,—when not forbidden by her own organic law,—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies.

The former adjudications of this Court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends. \* \* \*

The principle upon which the decisions in *Beer Co. v. Massachusetts, Fertilizing Co. v. Hyde Park, Stone v. Mississippi, and Butchers' Union Co. v. Crescent City Live-Stock Landing Co.* rest is that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority given by the state to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety. \* \* \*

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the state, or of the municipal government of New Orleans acting under authority for that

purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

\* \* \*

If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the state are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. \* \* \* In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed.

\* \* \*

The complainant was entitled to a decree perpetually restraining the defendants. \* \* \*

#### NOTES

1. A monopoly granted to a private corporation to lay water pipes in the public streets and to supply the inhabitants of the city of New Orleans with water was held to be protected against a later grant of an infringing right, on the reasoning of the principal case. *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273 (1885).

2. *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. 110 (1892) held repelable a grant made by the state legislature to the railroad company of all the state's rights and title to one thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, though no right to repeal had been expressly reserved, the court saying that such property is held by the state, by virtue of its sovereignty, in trust for the public.

## ST. CLOUD PUBLIC SERVICE CO. v. ST. CLOUD.

Supreme Court of the United States, 1924.  
265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. 492.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought by the Public Service Company to enjoin the city from interfering with a proposed increase in the rates charged for fuel gas.

The allegations of the bill, shortly stated, are: The company is a public service corporation organized under the laws of Minnesota, and the city, a municipal corporation of that state. In 1905 the city, by ordinance, granted the company's predecessor, its successors and assigns, the right to construct and maintain for thirty years works for the manufacture, distribution and sale of gas to the city and its inhabitants, and authorized it to sell fuel gas at a rate not exceeding \$1.35 per thousand cubic feet. The grantee's rights were assigned to the company in 1915, and since then it has been engaged in manufacturing and selling fuel gas under the ordinance. Since 1917 the company has sold fuel gas at the maximum rate of \$1.35 prescribed by the ordinance. This rate has not yielded, and cannot yield any return on the value of the property devoted to the gas business, has resulted in a constant loss and steadily increasing operating deficit, is inadequate and confiscatory, and deprives the company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution. The City Commission has refused to entertain a petition to prescribe a rate yielding a reasonable return on the invested capital. To secure a fair and reasonable return, a rate of \$3.39 per thousand cubic feet is necessary. The company intends to increase its rate to that price. The city, however, has threatened to interfere with the collection of the proposed increased rate, and, unless restrained, will attempt to force the company to continue to sell gas at the prescribed maximum rate, resulting in controversies and multiplicity of suits, and inflicting irreparable loss and injury upon the company.

The bill prays that the court adjudge that the maximum rate prescribed by the ordinance is confiscatory and violates the rights of the company under the Fourteenth Amendment; and that the city be enjoined from interfering with the company in raising the rate to \$3.39, or attempting in any manner to force it to continue to sell gas at the ordinance rate.

A motion by the company for a preliminary injunction was denied. Thereafter, on motion of the city, the court dismissed the bill for want of equity, on the ground that there was a "valid and subsisting contract between the city and the plaintiff company governing the matter of a maximum rate for fuel gas." The company, by reason of the constitutional question involved, has appealed directly to this Court. Jud. Code, § 238; *Columbus Ry. Co. v. Columbus*, 249 U. S. 399.

It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. *Southern Iowa Elec. Co. v. Chariton*, 255 U. S. 539, 542, and cases there cited; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267, 273; *Georgia Ry. Co. v. Decatur*, 262 U. S. 432, 438. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. Its solution turns upon the questions whether the city had power to contract on this subject by the ordinance of 1905; and, if so, whether the ordinance constituted such a contract.

1. Was the city authorized to enter into a contract as to the rate to be charged for fuel gas? Such authority must clearly and unmistakably appear. \* \* \* [Here the Court considered the provisions of the city charter and the decisions of the Supreme Court of Minnesota construing these provisions.]

In the light of these decisions of the Supreme Court of the State of Minnesota we think it is clear that the city had authority, in 1905, under its charter and the laws of the state, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed \* \* \* under the provisions of the charter giving the council the power to provide for the control and erection of gas works for the purpose of supplying the city and its inhabitants with heat and light.

\* \* \*

2. Did the ordinance constitute a contract fixing the maximum rate for gas? The intention to so contract must clearly and unmistakably appear. *Paducah v. Paducah Ry. Co.*, *supra*, p. 272. [Here are stated the "essential provisions" of the ordinance.]

We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the city and its inhabitants during the thirty-year period, at the maximum rate prescribed. \* \* \* The provision that the grantee is "authorized" to sell fuel gas at a rate not exceeding \$1.35, clearly implies that it shall not sell such gas at a higher rate. This is recognized by the bill itself. \* \* \*

3. The general provision of the Laws of 1919, c. 469, p. 603, authorizing cities of the class of the appellee "through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service", has no application to the present case. Even if, in any aspect, it could otherwise be applicable, it is excluded from operating here by the specific proviso that it shall not be "construed to impair the obligation of any contract or franchise provision now existing between any such city and any such public service corporation." The city, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the company, conversely, cannot under it obtain higher rates. The contract is binding on both parties alike.

The decree of the District Court is

Affirmed.

MR. JUSTICE BUTLER took no part in the hearing or decision of this case.

#### NOTES

1. Until the end of the nineteenth century rates for public utilities, if regulated at all, were usually fixed by contract in the charter of the corporation. In *Detroit v. Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410 (1902) it was held that a charter provision that the rate of fare should not exceed five cents was a contract surrendering the power of the city to prescribe a lower rate.

2. In *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. 428 (1921) a state constitutional provision "that no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof," was held to prevent a municipality, acting under the authority of the legislature, from entering into a binding contract as to public service rates.

#### MANIGAULT v. SPRINGS.

Supreme Court of the United States, 1905.

199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127.

[Plaintiff and defendants were adjoining riparian owners on the Santee River, at the mouth of Kinloch Creek. The creek was used as a highway by the riparian owners. In 1898 the defendants erected a dam across the creek. That same year the defendants removed the dam in pursuance of a contract between the plaintiff and the defendants whereby the latter agreed not to obstruct the channel of the creek. In 1903 the state legislature passed an act which recited the necessity of draining the low lands on the Santee River, whereby their taxable value would be greatly enhanced, and gave defendants by name authority to erect and maintain a dam across Kinloch Creek. Plaintiff

sued in a circuit court of the United States to restrain the defendants from erecting the dam or otherwise obstructing the creek. From a dismissal of his bill, he brought this appeal.]

MR. JUSTICE BROWN delivered the opinion of the Court. \* \* \*

The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31 and the free ingress and egress through the creek thereafter, was impaired by the act of the General Assembly of 1903, permitting the defendants by name to construct and maintain the dam in question.

It is the settled law of this Court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—a discretion which courts ordinarily will not interfere with. The leading case upon this point is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. \* \* \*

It only remains to consider, in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the state. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people, by the reclamation of swampy, overflowed and infertile lands, and the erection of dams, levees and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of said lands. \* \* \*

*Judgment affirmed.*

## NOTES

1. The student should note the distinction between those situations where contracts that may affect the public interest are made between individuals or corporations, and those where the state itself, or one of its subdivisions, has contracted with respect to such a subject matter.

2. In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. 117, 9 A. L. R. 1420 (1919) it was held that "reasonable" rates for supplying electricity fixed by the State Railroad Commission, pursuant to statutory authority, superseded rates fixed by private contract between the parties to the suit, entered into prior to the Commission's order.

3. "The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies and at the same time conditions its exercise." Mr. Justice Sutherland, in *Arkansas Natural Gas Co. v. Arkansas R. Commission*, 261 U. S. 379, 383, 67 L. ed. 705, 43 Sup. Ct. 387 (1923).

4. During "a social emergency caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort and even to the peace of a large part of the people of the state," a state statute was held valid which changed the legal effect of existing leases by substituting for the specific amount of rent contracted for "a fair and reasonable rent" to be fixed by a court. *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 66 L. ed. 595, 42 Sup. Ct. 289 (1922).

Other cases sustaining state legislation which impaired the obligation of existing contracts between private persons on the ground that they were enacted in the exercise of the police power: *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 65 L. ed. 877, 41 Sup. Ct. 465 (1921); *Thornton v. Duffy*, 254 U. S. 361, 65 L. ed. 304, 41 Sup. Ct. 137 (1920); *Sutter Butte Canal Co. v. Railroad Commission*, 279 U. S. 125, 73 L. ed. 637, 49 Sup. Ct. 325 (1929).

5. "The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing, enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated." *Cincinnati v. Louisville & Nashville R. Co.*, 223 U. S. 390, 400, 56 L. ed. 481, 32 Sup. Ct. 267 (1912). See also, *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 62 L. ed. 124, 38 Sup. Ct. 35 (1917); *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535 (1848).

## VON HOFFMAN v. QUINCY.

Supreme Court of the United States, 1866.

4 Wall. 535, 18 L. ed. 403.

[Error to review a judgment of the Circuit Court of the United States which had refused to issue a mandamus to the city ordering it to levy and collect a certain tax and to pay petitioner sufficient of

the proceeds to satisfy a judgment he held against the city. The unsatisfied judgment was for interest on bonds issued by the city under statutes which authorized the city to levy a special annual tax, sufficient to pay the annual interest on these bonds, and to hold the proceeds of this tax as a separate fund for this purpose. The city answered that a subsequent statute had repealed this special tax law and reduced its power to tax so that after paying current expenses nothing was left to pay interest on the bonds. Petitioner demurred on the ground that the repeal was inoperative to take away his right to have the city levy the special tax.]

MR. JUSTICE SWAYNE delivered the opinion of the Court. \* \* \*

It is \* \* \* settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. *Green v. Biddle*, 8 Wheat. 92; *Bronson v. Kinzie*, 1 How. 319; *McCracken v. Hayward*, 2 How. 612; *People v. Bond*, 10 Cal. 570; *Ogden v. Saunders*, 12 Wheat. 213.

In *Green v. Biddle*, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the states of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a state, and is contained in an act of the legislature of Virginia, passed in 1789, whereby it was provided "that all private rights and interests within" the district of Kentucky "derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." By two acts of the legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of that state. So far as they affected the lands covered by the compact, this Court declared them void. It was said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much violation of the compact as if they overturned his rights and interests."

In *Bronson v. Kinzie*, 1 How. 311, the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void.

In *McCracken v. Hayward*, 2 How. 608, the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason. \* \* \*

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedness may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of, the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*, 4 Wheat. 122, 197. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In *Green v. Biddle*, 8 Wheat. 84, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force." \* \* \*

This has reference to legislation which affects the contract directly, and not incidentally or only by consequence.

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper. *Beers v. Haughton*, 9 Pet. 359; *Ogden v. Saunders*, 12 Wheat. 230; *Mason v. Haile*, 12 Wheat. 373; *Sturges v. Crowninshield*, 4 Wheat. 122, 200. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."

It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void. *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608.

If these doctrines were *res integrae* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in *Mason v. Haile*, 12 Wheat. 379. But they rest in this Court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this Court renders the distinction one rather of form than substance.

When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that

anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. *New Jersey v. Wilson*, 7 Cranch, 166; *Dodge v. Woolsey*, 18 How. 331; *Piqua Branch v. Knoop*, 16 How. 369. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a mandamus. \* \* \*

Judgment reversed.

#### NOTES

1. The court in the principal case discusses without discrimination cases involving changes of remedies for the enforcement of wholly private contracts while disposing of an issue relating to a public contract. The term "public contract" is used to include any contract at least one party to which is a governmental unit, whether the United States, a state, a municipality, a county, or other subordinate governmental agency. In analyzing the cases in this chapter the student should consider whether private and public contracts stand on the same footing with respect to the amount of protection afforded by the contract clause. Also worthy of consideration is the difference between contracts with a state and contracts with a subordinate public corporation of the state.

2. In *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529 (1819) it was held that, in the absence of a national bankruptcy law, a state could enact and enforce such a law within its territorial limits, but that a state law which not only released the person of the debtor from imprisonment but also discharged him from all liability for the debt, was invalid under the contract clause as applied to a debt contracted prior to its enactment. Later, in *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606 (1827) it was held that a state insolvency law discharging a debtor from the obligation of a contract does not violate the contract clause when applied to a contract made subsequent to the enactment of the law, such law being considered as having entered into the contract. It was further

held, however, that a discharge of a debtor under a state insolvency act in force when the debt arose is not valid as against nonresident creditors who do not appear in the insolvency proceedings.

3. The contract clause was held to protect the title of a purchaser from the state of tax-forfeited lands against the effects of the repeal of a statute which had been originally enacted to prevent the setting aside of tax sales, and titles based upon them, for irregularities in assessment, levy or sale. *Wood v. Lovett*, 313 U. S. 362, 85 L. ed. 1404, 61 Sup. Ct. 983 (1941).

4. *Lynch v. United States*, 292 U. S. 571, 78 L. ed. 1434, 54 Sup. Ct. 840 (1934) held that war risk insurance policies issued by the government are legal obligations of the United States even though not entered into for gain, and that an Act of Congress repealing "all laws granting or pertaining to yearly renewable term insurance" was invalid when construed to take away the contractual right and not merely to withdraw consent to sue the United States. Mr. Justice Brandeis, speaking for the court, said: "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. \* \* \* When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power. \* \* \* Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded, not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration." The case thus applies the Fifth Amendment so as to afford protection against contract impairment by the national government, although there is no contract clause applicable in specific terms to the United States. Immunity from suit, however, is an attribute of sovereignty which may not be bartered away.

#### BANK OF MINDEN v. CLEMENT.

Supreme Court of the United States, 1921.  
256 U. S. 126, 65 L. ed. 857, 41 Sup. Ct. 408.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

By Act No. 189 of 1914, the Louisiana legislature undertook to exempt from debts of the assured the avails of insurance upon his life when payable to his estate.

Before passage of that act and while indebted to plaintiffs in error banks, by notes which were renewed from time to time until his death, O. P. Clement took out two policies upon his life with loss payable to his executors, administrators or assigns. He died in 1917 and his administratrix collected the stipulated sums amounting to \$4,433.33. The succession was insolvent, and the banks sought to subject the insurance money to their claims, maintaining that if construed and applied so as to exempt such funds the Act of 1914 would impair the obligations of

their contracts and violate § 10, Article I, federal Constitution. The Supreme Court of the State held that acceptance of the renewal notes did not operate as novations, but that the statute protected the insurance money without violating the federal Constitution since the exemption "impaired the obligation of the preexisting contract very slightly and remotely." 146 Louisiana, 385. \* \* \*

When the deceased took out the policies of insurance upon his life they became his property subject to claims of his creditors. \* \* \*

In *Sturges v. Crowninshield*, 4 Wheat. 122, 197, 198, opinion by Mr. Chief Justice Marshall, it was said: "What is the obligation of a contract? and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. \* \* \* Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. \* \* \* But it is not true, that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." And, in *Planters' Bank v. Sharp*, 6 How. 301, 327, opinion by Mr. Justice Woodbury: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." *Ogden v. Saunders*, 12 Wheat. 213, 257; *McCracken v. Hayward*, 2 How. 608, 612; *Edwards v. Kearzey*, 96 U. S. 595, 600.

So far as the statute of 1914 undertook to exempt the policies and their proceeds from antecedent debts it came into conflict with the federal Constitution. \* \* \*

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARKE dissents.

## NOTES

1. "The distinction was well expressed by Mr. Justice Harlan, speaking for this court, as follows: 'It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract

was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.' *Oshkosh Water Works Co. v. Oshkosh*, 187 U. S. 437, 439; citing many previous cases." *Mr. Justice Pitney in National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 283, 57 L. ed. 221, 33 Sup. Ct. 17 (1912).

2. "The passage of a new statute of limitations, giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the Constitution, provided a reasonable time is given for the bringing of such actions." *McGahey v. Virginia*, 135 U. S. 662, 705, 34 L. ed. 304, 10 Sup. Ct. 972 (1890). On what has been deemed a reasonable time in various cases, see notes in 1 L. R. A. (N. S.) 528, 529, 21 L. R. A. (N. S.) 157.

### HOME BUILDING & LOAN ASSN. v. BLAISDELL.

Supreme Court of the United States, 1934.

290 U. S. 538, 78 L. ed. 413, 54 Sup. Ct. 231, 88 A. L. R. 1481.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Appellant contests the validity of Chapter 339 of the Laws of Minnesota of 1933, p. 514, approved April 18, 1933, called the Minnesota Mortgage Moratorium Law, as being repugnant to the contract clause (Art. I, § 10) and the due process and equal protection clauses of the Fourteenth Amendment, of the Federal Constitution. The statute was sustained by the Supreme Court of Minnesota, 189 Minn. 422, 448; 249 N. W. 334, 893, and the case comes here on appeal.

The Act provides that, during the emergency declared to exist, relief may be had through authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended. The Act does not apply to mortgages subsequently made nor to those made previously which shall be extended for a period ending more than a year after the passage of the Act (Part One, § 8). There are separate provisions in Part Two relating to homesteads, but these are to apply "only to cases not entitled to relief under some valid provision of Part One." The Act is to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." No extension of the period for redemption and no postponement of sale is to be allowed which would have the effect of extending the period of redemption beyond that date. Part Two, § 8.

The Act declares that the various provisions for relief are severable; that each is to stand on its own footing with respect to validity. Part One, § 9. We are here concerned with the provisions of Part One, § 4, authorizing the District Court of the County to extend the period of redemption from foreclosure sales "for such additional time as

the court may deem just and equitable," subject to the above described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or if it has no income, then the reasonable rental value of the property, and directing the mortgagor "to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage \* \* \* indebtedness at such times and in such manner" as shall be determined by the court. The section also provides that the time for redemption from foreclosure sales theretofore made, which otherwise would expire less than thirty days after the approval of the Act shall be extended to a date thirty days after its approval, and application may be made to the court within that time for a further extension as provided in the section. By another provision of the Act, no action, prior to May 1, 1935, may be maintained for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of the Act has expired. Prior to the expiration of the extended period of redemption the court may revise or alter the terms of the extension as changed circumstances may require. Part One, § 5.

Invoking the relevant provision of the statute, appellees applied to the District Court of Hennepin County for an order extending the period of redemption from a foreclosure sale. Their petition stated that they owned a lot in Minneapolis which they had mortgaged to appellant; that the mortgage contained a valid power of sale by advertisement and that by reason of their default the mortgage had been foreclosed and sold to appellant on May 2, 1932, for \$3,700.98; that appellant was the holder of the sheriff's certificate of sale; that because of the economic depression appellees had been unable to obtain a new loan or to redeem, and that unless the period of redemption were extended the property would be irretrievably lost; and that the reasonable value of the property greatly exceeded the amount due on the mortgage including all liens, costs and expenses.

On the hearing, appellant objected to the introduction of evidence upon the ground that the statute was invalid under the federal and state constitutions, and moved that the petition be dismissed. The motion was granted and a motion for a new trial was denied. On appeal, the Supreme Court of the State reversed the decision of the District Court. 189 Minn. 422; 249 N. W. 334. Evidence was then taken in the trial court and appellant renewed its constitutional objections without avail. The court made findings of fact setting forth the mortgage made by the appellees on August 1, 1928, the power of sale contained in the mortgage, the default and foreclosure by advertisement, and the sale to appellant on May 2, 1932, for \$3,700.98. The court found that the time to redeem would expire on May 2, 1933, under the laws of the State as they were in effect when the mortgage was made and when it was foreclosed; that the reasonable value of

the income on the property, and the reasonable rental value, was \$40 a month; that the bid made by appellant on the foreclosure sale, and the purchase price, were the full amount of the mortgage indebtedness, and that there was no deficiency after the sale; that the reasonable present market value of the premises was \$6,000; and that the total amount of the purchase price, with taxes and insurance premiums subsequently paid by appellant, but exclusive of interest from the date of sale, was \$4,056.39. The court also found that the property was situated in the closely built-up portions of Minneapolis; that it had been improved by a two-car garage, together with a building two stories in height which was divided into fourteen rooms; that the appellees, husband and wife, occupied the premises as their homestead, occupying three rooms and offering the remaining rooms for rental to others.

The court entered its judgment extending the period of redemption to May 1, 1935, subject to the condition that the appellees should pay to the appellant \$40 a month through the extended period from May 2, 1933, that is, that in each of the months of August, September, and October, 1933, the payments should be \$80, in two instalments, and thereafter \$40 a month, all these amounts to go to the payment of taxes, insurance, interest, and mortgage indebtedness. It is this judgment, sustained by the Supreme Court of the State on the authority of its former opinion, which is here under review. 189 Minn. 448; 249 N. W. 893. \* \* \*

We approach the questions thus presented upon the assumption made below, as required by the law of the State, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable the period of redemption from the sale was one year and that it has been extended by the judgment of the court over the opposition of the mortgagee-purchaser; and that during the period thus extended, and unless the order for extension is modified, the mortgagee-purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute not been enacted. The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee-purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance, and interest on the mortgage indebtedness. While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

In determining whether the provision for this temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of the obligations of contracts, we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction which we may consider to be established.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson v. New*, 243 U. S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts." But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause. The necessity of construction is not obviated by the fact that the contract clause is associated in the same section with other and more specific prohibitions. \* \* \*

The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States in relation to the operation of contracts, to protect the vital

interests of the community? Questions of this character, "of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation." Story on the Constitution, § 1375.

The obligation of a contract is "the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*, 4 Wheat. 122, 197; Story, op. cit., § 1378. This Court has said that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. \* \* \* Nothing can be more material to the obligation than the means of enforcement. \* \* \* The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion." *Von Hoffman v. Quincy*, 4 Wall. 535, 550, 552. See, also, *Walker v. Whitehead*, 16 Wall. 314, 317. But this broad language cannot be taken without qualification. Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges v. Crowninshield*, supra, p. 200. Said he: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." And in *Von Hoffman v. Quincy*, supra, pp. 553, 554, the general statement above quoted was limited by the further observation that "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." And Chief Justice Waite, quoting this language in *Antonio v. Greenhow*, 107 U. S. 769, 775, added: "In all such cases the question becomes therefore, one of reasonableness, and of that the legislature is primarily the judge."

The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges v. Crowninshield*, supra, pp. 197, 198) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights. In *Sturges v. Crowninshield*, supra, a state insolvent law, which discharged the debtor from liability was held to be invalid as applied to contracts in existence when the law was passed. See *Ogden v. Saunders*, supra. In *Green v. Biddle*, 8 Wheat. 1, the legislative acts, which were successfully assailed, exempted the occupant of land from the payment of rents and profits to the rightful owner

and were "parts of a system the object of which was to compel the rightful owner to relinquish his lands or pay for all lasting improvements made upon them, without his consent or default." In *Bronson v. Kinzie*, 1 How. 311, state legislation, which had been enacted for the relief of debtors in view of the seriously depressed condition of business, following the panic of 1837, and which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on foreclosure, and further prevented any sale unless two-thirds of the appraised value of the property should be bid therefor, was held to violate the constitutional provision. It will be observed that in the *Bronson* case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, and there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period. *McCracken v. Hayward*, 2 How. 608, *Gantly's Lessee v. Ewing*, 3 How. 707, and *Howard v. Bugbee*, 24 How. 461, followed the decision in *Bronson v. Kinzie*; that of *McCracken*, condemning a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of three householders; that of *Gantly's Lessee*, condemning a statute which required a sale for not less than one-half the appraised value; and that of *Howard*, making a similar ruling as to an unconditional extension of two years for redemption from foreclosure sale.

\* \* \*

None of these cases, and we have cited those upon which appellant chiefly relies, is directly applicable to the question now before us in view of the conditions with which the Minnesota statute seeks to safeguard the interests of the mortgagee-purchaser during the extended period. And broad expressions contained in some of these opinions went beyond the requirements of the decision, and are not controlling. *Cohens v. Virginia*, 6 Wheat. 264, 399.

Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford*, 287 U. S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

While the charters of private corporations constitute contracts, a grant of exclusive privilege is not to be implied as against the State. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. And all contracts are subject to the right of eminent domain. *West River Bridge v. Dix*, 6 How. 507. The reservation of this necessary authority of the State is deemed to be a part of the contract. \* \* \*

The legislature cannot "bargain away the public health or the public morals." Thus, the constitutional provision against the impairment of contracts was held not to be violated by an amendment of the state constitution which put an end to a lottery theretofore authorized by the legislature. *Stone v. Mississippi*, 101 U. S. 814, 819. See, also, *Douglas v. Kentucky*, 168 U. S. 488, 497-499; compare *New Orleans v. Houston*, 119 U. S. 265, 275. The lottery was a valid enterprise when established under express state authority, but the legislature in the public interest could put a stop to it. A similar rule has been applied to the control by the State of the sale of intoxicating liquors. *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 33; see *Mugler v. Kansas*, 123 U. S. 623, 664, 665. The States retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 750. Legislation to protect the public safety comes within the same category of reserved power. *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 70, 74; *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 414; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558. This principle has had recent and noteworthy application to the regulation of the use of public highways by common carriers and "contract carriers," where the assertion of interference with existing contract rights has been without avail. *Sproles v. Binford*, 286 U. S. 374, 390, 391; *Stephenson v. Binford*, *supra*.

The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. \* \* \*

A statute of New Jersey prohibiting the transportation of water of the State into any other State was sustained against the objection that the statute impaired the obligation of contracts which had been made for furnishing such water to persons without the State. *Hudson Water Co. v. McCarter*, 209 U. S. 349. Said the Court, by Mr. Justice Holmes (*id.* p. 357): "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." The general authority of the legislature to regulate, and thus to modify, the rates charged by public service corporations affords another illustration. *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307, 325, 326. \* \* \*

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Another argument, which comes more closely to the point, is that the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety or welfare, or where the prohibition is merely of injurious practices; that interference with the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissible. This is but to contend that in the latter case the end is not legitimate in the view that it cannot be reconciled with a fair interpretation of the constitutional provision.

Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake. See *American Land Co. v. Zeiss*, 219 U. S. 47. The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes.

Whatever doubt there may have been that the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obli-

gations, by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. *Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242. The case of *Block v. Hirsh*, supra, arose in the District of Columbia and involved the due process clause of the Fifth Amendment. The cases of the *Marcus Brown Company* and the *Levy Leasing Company* arose under legislation of New York and the constitutional provision against the impairment of the obligation of contracts was invoked. \* \* \*

It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch v. Maryland*, 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U. S. 416, 433, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. \* \* \* The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." \* \* \*

Applying the criteria established by our decisions we conclude:

1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community. The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. *Block v. Hirsh*, *supra*. The finding of the legislature and state court has support in the facts of which we take judicial notice. *Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, 260. It is futile to attempt to make a comparative estimate of the seriousness of the emergency shown in the leasing cases from New York and of the emergency disclosed here. The particular facts differ, but that there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil. As the Supreme Court of Minnesota said, the economic emergency which threatened "the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.

2. The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society.

3. In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.

4. The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession. Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not

seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief. \* \* \*

5. The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts.

We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution. Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.

What has been said on that point is also applicable to the contention presented under the due process clause. \* \* \*

Nor do we think that the statute denies to the appellant the equal protection of the laws. The classification which the statute makes cannot be said to be an arbitrary one. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Clark v. Titusville*, 184 U. S. 329; *Quong Wing v. Kirkendall*, 223 U. S. 59; *Ohio Oil Co. v. Conway*, 281 U. S. 146; *Sproles v. Binford*, 286 U. S. 374.

The judgment of the Supreme Court of Minnesota is affirmed.

Judgment affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.

A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If

the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now.

\* \* \*

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. *Lake County v. Rollins*, 130 U. S. 662, 770. \* \* \*

An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in time of financial distress. Indeed, it is not probable that any other purpose was definitely in the minds of those who composed the framers' convention or the ratifying state conventions which followed, although the restriction has been given a wider application upon principles clearly stated by Chief Justice Marshall in the *Dartmouth College Case*, 4 Wheat. 518, 644-645. \* \* \*

If it be possible by resort to the testimony of history to put any question of constitutional intent beyond the domain of uncertainty, the foregoing leaves no reasonable ground upon which to base a denial that the clause of the Constitution now under consideration was meant to foreclose state action impairing the obligation of contracts *primarily and especially* in respect of such action aimed at giving relief to debtors *in time of emergency*. And if further proof be required to strengthen what already is inextinguishable, such proof will be found in the previous decisions of this Court. \* \* \*

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.

The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this Court. That defense should not now succeed because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for the processes of logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it. \* \* \*

It is quite true that an emergency may supply the occasion for the exercise of power, depending upon the nature of the power and the intent of the Constitution with respect thereto. The emergency of war furnishes an occasion for the exercise of certain of the war powers. This the Constitution contemplates, since they cannot be exercised upon any other occasion. The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence. Const. Art. IV, § 4. But we are here dealing, not with a power granted by the Federal Constitution, but with the state police power, which exists in its own right. Hence the question is, not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. That clause restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were non-existent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality it simply carries us back in a circle, like bewildered travelers lost in a wood, to the point where we parted company with the view of the state court.

If what has now been said is sound, as I think it is, we come to what really is the vital question in the case: Does the Minnesota statute constitute an impairment of the obligation of the contract now under review? \* \* \*

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy merely; it destroys, for the period of delay, *all* remedy so far

as the enforcement of that right is concerned. The phrase, "obligation of a contract," in the constitutional sense imports a legal duty to perform the specified obligation of *that* contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a state, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract, or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear. As this court has well said, whatever tends to postpone or retard the enforcement of a contract, to that extent weakens the obligation. \* \* \*

I am authorized to say that MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS and MR. JUSTICE BUTLER concur in this opinion.

#### NOTES

1. The principal case is discussed in Prosser, *The Minnesota Mortgage Moratorium*, 7 So. Cal. L. Rev. 353 (1934), 2 *Selected Essays on Constitutional Law* (1938), 359.

2. Following closely upon the decision in the *Blaisdell* case, two Arkansas statutes of 1933 were held invalid as impairing the obligations of prior contracts. In *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, 78 L. ed. 1344, 54 Sup. Ct. 816, 93 A. L. R. 173 (1934) the challenged law exempted all moneys paid or payable to any resident of the state as the insured or beneficiary under a life insurance policy from seizure under judicial process. The court, through Chief Justice Hughes, pointed out that the relief sought to be afforded was neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the act contained no limitations as to time, amount, circumstances, or need. While the legislature had sought to justify the exemption by reference to an emergency, the statute was not limited to the emergency and set up no conditions apposite to emergency relief. In *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, 79 L. ed. 1298, 55 Sup. Ct. 555, 97 A. L. R. 905 (1935) the invalidated legislation made over a prior state plan to enforce the payment of benefit assessments for municipal corporations. Under the new plan the time for payment after notice was enlarged from thirty days to ninety; the penalty was reduced from 20% to 3%; the return of the delinquent list, which till then had to be made forthwith, was to be withheld for another ninety days; the time to appear and answer after personal service, which had formerly been five days, was changed to six months; if service was constructive, there was to be publication for six months instead of fifteen days, and another six months was to elapse before the cause was to be heard; the decree when rendered was to give still another twelve months for payment, instead of ten days as theretofore, and an additional six months after the new default before the property could be sold; the time for redemption was fixed at four years from the sale, and the rate of interest (formerly 10% or 20%) was reduced to 6%, the statute reciting that the law previously in force did not provide an adequate period of redemption from land sales for delinquent taxes in municipal improvement districts; finally, under the new law, there was a repeal of a provision under which a purchaser had been given the right to go into possession during the term allowed for redemption and to hold such possession without accountability for rents.

The court said that while "a state is free to regulate the procedure in its courts even with reference to contracts already made" and that "moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved" an entirely different situation is presented "when extensions are so piled up as to make the remedy a shadow."

In *Faitoute Iron & Steel Co. v. Asbury Park*, 316 U. S. 502, 86 L. ed. 1629, 62 Sup. Ct. 1129 (1942) a state statute was held valid under which a New Jersey city put through a composition with its bond creditors with respect to bonds outstanding when the statute was enacted. Under the composition the refunding bonds were the same in amount as the principal of the old bonds but at a lower rate of interest. The statute made the composition agreement binding on the consent of 85% of the creditors. In holding that the dissenters could not recover on their old bonds, the court distinguished *W. B. Worthen v. Kavanaugh*, supra, and said that in the statute under consideration there was evidence of "state intervention, carefully devised, worked out with scrupulous detail and with due regard to the interests of all the creditors, and scrutinized to that end by the state judiciary with the result that that which was a most depreciated claim of little value has, by the very scheme complained of, been saved and transmuted into substantial value."

3. In *East New York Savings Bank v. Hahn*, 326 U. S. 230, 90 L. ed. 34, 66 Sup. Ct. 69, 160 A. L. R. 1279 (1945) the Supreme Court upheld the renewal in 1943 of the New York Moratorium Law (first enacted in 1933), which suspended for a year the right of foreclosure for default in the payment of principal as to mortgages executed prior to July 1, 1932.

4. Statutes limiting the amount of a deficiency judgment against the mortgagor to the excess of the debt over the fair market value of the mortgaged property in cases where the mortgagee purchased at the foreclosure sale have been sustained as to prior mortgages in several decisions. *Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Co.*, 300 U. S. 124, 81 L. ed. 552, 57 Sup. Ct. 338, 108 A. L. R. 886 (1937); *Honeyman v. Jacobs*, 306 U. S. 539, 83 L. ed. 972, 59 Sup. Ct. 702 (1939); *Gelfert v. National City Bank*, 313 U. S. 221, 85 L. ed. 1299, 61 Sup. Ct. 898, 133 A. L. R. 1467 (1941). The *Gelfert* case involved a New York statute enacted in 1938 which did not purport to relieve a declared public emergency and was unrestricted in its application. But the court, holding that the principles of the earlier decisions were applicable, said: "The fact that an emergency was not declared to exist when this statute was passed does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman v. Jacobs*."

### COOMBES v. GETZ.

Supreme Court of the United States, 1932.  
285 U. S. 434, 76 L. ed. 866, 52 Sup. Ct. 435.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit brought in a California superior court by petitioner, on behalf of himself and other creditors, to recover from respondent, a director in Getz Bros. & Company, a California corporation, the amount of an indebtedness upon an open account for goods sold to the corporation by petitioner's assignor. The basis of the liability sought to be enforced is found in the following provision of § 3, Art. XII, of the California Constitution of 1879:

"The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

The bill alleges misappropriation and embezzlement of moneys of the corporation by its officers, with appropriate details to bring the respondent within the terms of the foregoing provision. The superior court sustained a demurrer to the complaint, for reasons not material here, and rendered final judgment accordingly. An appeal was taken to the state supreme court; and, while that appeal was pending, the provision of the state constitution above quoted was repealed. Thereupon, respondent moved to dismiss the appeal, on the ground that the cause of action had abated by reason of the repeal of the provision of law upon which it was based. The court sustained the motion and dismissed the appeal [*Coombes v. Franklin*] 1 P. (2d) 992; and subsequently denied a petition for rehearing, 4 P. (2d) 157.

In substance, it was held that the right accorded to corporate creditors was created by, and dependent alone upon, the constitutional provision, said to have the force of a statute; and that when that was repealed, the right fell with it, being still inchoate, not reduced to possession nor perfected by final judgment. It was conceded that the liability created by the constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors. But this contractual liability, it was said, was conditioned by the power reserved over corporate laws by § 1, Art. XII, of the constitution, as follows:

"All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

In virtue of this reservation of power, the state court held that the repeal of the liability provision was a known contingency constituting a part of the contract as much as the provision which imposed the liability. \* \* \*

In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor's cause of action, unless previously reduced to final judgment.

The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. \* \* \* The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was

not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor v. Tacoma*, 228 U. S. 148, 156; *Pritchard v. Norton*, 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor v. Tacoma*, *supra*; *Hawthorne v. Calef*, 2 Wall. 10; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ochiltree v. Railroad Co.*, 21 Wall. 249, 252-253; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 390 et seq.; *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764, 767. \* \* \*

Respondent, however, insists that long prior to the extension of credit to the corporation by petitioner's assignor, the decisions of the Supreme Court of California had established that the repeal of a law creating such a liability as that here involved extinguishes the cause of action; and that this amounted to a construction of the constitutional provision which entered into the contract and will be followed and applied by this Court. *Warburton v. White*, 176 U. S. 484, 495; *Ennis Water Works v. Ennis*, 233 U. S. 652, 657. But upon a careful consideration of the California cases referred to, we are of opinion that they fail to establish the premises upon which the conclusion is based. \* \* \* [The discussion of the cases is omitted.]

The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship. *Harrison v. Remington Paper Co.*, *supra*, p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts \* \* \* that upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution.

Decree reversed.

MR. JUSTICE CARDOZO, dissenting.

I am unable to concur in the reversal of this judgment. \* \* \*

The Supreme Court of California has said that the liability thus created is contractual (*Dean v. Shingle*, 198 Cal. 652; 246 Pac. 1049); but only in a qualified sense, as the expression of a legal fiction, is the statement true, nor did the court that made it intend otherwise. The liability would not be destroyed though the directors when assuming office and repeatedly thereafter were to repudiate the obligation utterly.

They would be held for all their protestations upon a liability imposed by law. Indeed, they would have to answer to the creditors though they had ceased to be directors before the debts were in existence. If we put aside deceptive labels, borrowed from the law of quasi-contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (*Crane v. Hahlo*, 258 U. S. 142, 146), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors (compare *Christopher v. Norvell*, 201 U. S. 216, 225; *Bernheimer v. Converse*, 206 U. S. 516, 529). The decisions in California, when analyzed, will be found to hold nothing to the contrary. They amount merely to this, that the liability created by the statute, which is enforceable also by the shareholders, is not penal but remedial, and is limited to the damage resulting to the corporation from the loss of the embezzled moneys as if the director were a surety to the corporation for the acts of its defaulting officer (*Dean v. Shingle*, *supra*; compare, *Winchester v. Howard*, 136 Cal. 432; 64 Pac. 692; 69 Pac. 77). In any event, this Court is not controlled by the label which the state court may affix to a liability growing out of a given state of facts. It determines for itself whether within the meaning of the Constitution the product is a contract to be protected by the power of the nation (*Appleby v. New York*, 271 U. S. 364, 380; *Coolidge v. Long*, 282 U. S. 582, 597). As to this, its judgment is guided by realities and not by words. The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact (*Crane v. Hahlo*, 258 U. S. 142, 146; *Louisiana v. New Orleans*, 109 U. S. 285, 288). Here whatever duty was assumed by a director through the acceptance of his office, was one that he owed in the first instance to the corporation itself, though the creditors and shareholders were privileged to enforce it (*Dean v. Shingle*, *supra*). Payment to the corporation before action brought would establish a defense, and even after action brought, any surplus remaining would go into the treasury. A distinction may exist between a liability cast upon directors and one cast upon the shareholders, who are quasi-partners in the venture (*Corning v. McCullough*, 1 N. Y. 47). To develop the implications of the distinction is unnecessary now.

I start then with the assumption that the petitioner had a contract with a corporation secured in certain contingencies by a statutory liability. I add the assumption that the State of California was not at liberty, after the contract had been made and a cause of action had accrued thereunder, to make the security defeasible if it was indefeasible in its origin. Either the article of the Constitution prohibiting the impairment of contracts (U. S. Constitution, Art. I, sec. 10) or the Fourteenth Amendment (which, however, is not invoked) might then stand in the way. \* \* \* The difficulty with the petitioner's case is this, that his security in its origin was not vested, but contingent. The mean-

ing of the California constitution is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making. Long before that time, the Supreme Court of that State had held that under the law of California a statutory cause of action, whether penal or remedial, may be canceled or modified by repeal or amendment until it has ripened into a judgment. \* \* \* I assume for present purposes that the rule thus announced would be held of no effect if the statute and decisions declaring it had been made after Coombes became a creditor. Made as they were before that time, they were reservations or conditions limiting the statutory liability, and to be read into the statute, and hence into any contract to which the statute was an incident, as if written there in words. \* \* \* "The claim of an irrepealable contract cannot be predicated upon a contract which is repealable" (*Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 346). Either the petitioner took his cause of action subject to such infirmities or contingencies as were attached to it by the law of the State of its creation, or he did not take anything.

This view of the case puts aside as irrelevant the provision of the California constitution permitting the amendment of corporate charters, and sustains the repeal upon the ground that the liability by the law of its creation was defeasible in its origin.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this dissent.

#### NOTE

1. The validity of civil retrospective legislation may be attacked under the due process clauses of the Fifth and Fourteenth Amendments. Provisions of state constitutions also afford some protection against laws of this type. See, generally, Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927), 6 id. 409 (1928), 2 *Selected Essays on Constitutional Law* (1938), 266; Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).

In *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. 209 (1885) it was held that the repeal of a statute of limitations, which resulted in the revival of a cause of action based on contract, did not violate the due process clause of the Fourteenth Amendment. The court, through Justice Miller, said: "We are unable to see how a man can be said to have *property* in the bar of the statute as a defense to his promise to pay. \* \* \* We can understand a right to enforce the payment of a lawful debt. The Constitution says that no state shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations." Justices Bradley and Harlan dissented.

In *Chase Securities Corporation v. Donaldson*, 325 U. S. 304, 89 L. ed. 1628, 65 Sup. Ct. 1137 (1945), where the statute of limitations was tolled in a pending suit to recover the purchase price of securities sold in violation of the Minnesota blue sky law, the court said: "The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth

Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."

CHAPTER XII  
THE AMENDMENT OF THE CONSTITUTION

NATIONAL PROHIBITION CASES.

Supreme Court of the United States, 1920.  
253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. 486.

MR. JUSTICE VAN DEVANTER [after quoting the text of the amendment clause of the Constitution, Article V, and the Eighteenth Amendment] announced the conclusions of the Court.

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, c. 83, 41 Stat. 305, which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, Original,—were brought in this Court, and the others in district courts. Nos. 696, 752, 788 and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.
2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. *Missouri Pacific Ry. Co. v. Kansas*, 248 U. S. 276.
3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. *Hawke v. Smith*, 253 U. S. 221.
4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits. \* \* \*

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.

In No. 794 the decree [granting injunction] is reversed.

In Nos. 696, 752, 788 and 837 the decrees [refusing to grant injunctions] are affirmed.

[MR. CHIEF JUSTICE WHITE and MR. JUSTICE McREYNOLDS delivered separate concurring opinions. JUSTICES McKENNA and CLARKE delivered dissenting opinions.]

## NOTES

1. Counsel contesting the validity of the Eighteenth Amendment in the above cases argued that there were certain implied restrictions upon the amending power which the Supreme Court should recognize and enforce. Specifically, they contended that the Eighteenth Amendment (1) invaded the police powers reserved to the states under the Tenth Amendment and directly encroached upon their right of local self-government, thus subverting the dual and federal system of government; and (2) was a police regulation of the conduct and life of the individual which had no place in the organic law.

2. On problems relating to Constitutional amendment and revision see, generally, Orfield, *The Amending of the Federal Constitution* (1942). See also, Marbury, *The Limitations Upon the Amending Power*, 33 Harv. L. Rev. 223 (1919); Frierson, *Amending the Constitution of the United States: A Reply to Mr. Marbury*, 33 Harv. L. Rev. 659 (1920); McGovney, *Is the Eighteenth Amendment Void Because of its Contents?* 20 Col. L. Rev. 499 (1920); Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 Mich. L. Rev. 213 (1920). For some suggestions as to the possible content of legislation by Congress on this subject, see Dowling, *Clarifying the Amending Process*, 1 Wash. & Lee L. Rev. 215 (1940).

## LESER v. GARNETT.

Supreme Court of the United States, 1922.

258 U. S. 130, 66 L. ed. 505, 42 Sup. Ct. 217.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On October 12, 1920, Cecilia Streett Waters and Mary D. Randolph, citizens of Maryland, applied for and were granted registration as qualified voters in Baltimore City. To have their names stricken from

the list Oscar Leser and others brought this suit in the Court of Common Pleas. The only ground of disqualification alleged was that the applicants for registration were women, whereas the constitution of Maryland limits the suffrage to men. Ratification of the proposed Amendment to the federal Constitution, now known as the Nineteenth, 41 Stat. 362, had been proclaimed on August 26, 1920, 41 Stat. 1823, pursuant to Rev. Stat., § 205. The legislature of Maryland had refused to ratify it. The petitioners contended, on several grounds, that the Amendment had not become part of the federal Constitution. \* \* \*

The first contention is that the power of amendment conferred by the federal Constitution and sought to be exercised does not extend to this Amendment, because of its character. The argument is that so great an addition to the electorate, if made without the state's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six states including Maryland, has been recognized and acted on for half a century. See *United States v. Reese*, 92 U. S. 214; *Neal v. Delaware*, 103 U. S. 370; *Guinn v. United States*, 238 U. S. 347; *Myers v. Anderson*, 238 U. S. 368. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

The second contention is that in the constitutions of several of the thirty-six states named in the proclamation of the secretary of state there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislatures were without power to ratify. But the function of a state legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state. *Hawke v. Smith*, 253 U. S. 221; *National Prohibition Cases*, 253 U. S. 350, 386.

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other states—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six states, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States."

As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field v. Clark*, 143 U. S. 649, 669-673, is applicable here. See also *Harwood v. Wentworth*, 162 U. S. 547, 562.

Affirmed.

#### NOTE

1. In *United States v. Sprague*, 282 U. S. 716, 75 L. ed. 640, 51 Sup. Ct. 220, 71 A. L. R. 1381 (1931) it was contended that the Eighteenth Amendment was void because it was ratified by state legislatures rather than by state ratifying conventions. The argument was to the effect that it was the intent of the framers that only proposed amendments effecting changes in the character of federal means or machinery should be held capable of ratification by legislatures. Amendments conferring on the United States new and direct powers over individuals, as in the Eighteenth Amendment, should be ratified by conventions. Moreover, it was asserted that the Tenth Amendment requires that amendments which reduce the powers reserved to the states can validly be ratified only by conventions composed of representatives specially chosen for this purpose, since legislatures are incompetent to surrender the people's liberties. The Supreme Court repudiated all these contentions, saying: "If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article V as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended." As regards the claim that the Tenth Amendment imposes some limitation on Article V, the opinion stated: "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified and has no limited and special operation, as is contended, upon the people's delegation by Article V of certain functions to the Congress."

#### COLEMAN v. MILLER.

Supreme Court of the United States, 1939.

307 U. S. 433, 83 L. ed. 1385, 59 Sup. Ct. 972, 122 A. L. R. 695.

Opinion of the Court by Mr. CHIEF JUSTICE HUGHES, announced by Mr. JUSTICE STONE.

In June, 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment. In January, 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States. In January, 1937, a resolution known as "Senate Concurrent Resolution No. 3" was introduced in the Senate of Kansas ratifying the proposed amendment. There were forty sena-

tors. When the resolution came up for consideration, twenty senators voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution. The resolution was later adopted by the House of Representatives on the vote of a majority of its members.

This original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the House of Representatives, to compel the Secretary of the Senate to erase an endorsement on the resolution to the effect that it had been adopted by the Senate and to endorse thereon the words "was not passed," and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The petition challenged the right of the Lieutenant Governor to cast the deciding vote in the Senate. The petition also set forth the prior rejection of the proposed amendment and alleged that in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six states, and had been ratified in only five states, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality. \* \* \*

The Supreme Court found no dispute as to the facts. The court entertained the action and held that the Lieutenant Governor was authorized to cast the deciding vote, that the proposed amendment retained its original vitality, and that the resolution "having duly passed the house of representatives and the senate, the act of ratification of the proposed amendment by the legislature of Kansas was final and complete." The writ of mandamus was accordingly denied. 146 Kan. 390; 71 P. 2d 518. This Court granted certiorari. 303 U. S. 632.

*First. The jurisdiction of this Court.*—[Here the opinion after pointing out that the question at issue arose under the federal Constitution, Article V, and was therefore a federal question, addressed itself to the sufficiency of the interest of the plaintiffs to invoke a decision. On this point the opinion stated that "the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." The opinion cited *Leser v. Garnett*, 258 U. S. 130, as in point and said, "The interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case."

On this point four justices dissented, JUSTICES ROBERTS, BLACK, DOUGLAS and FRANKFURTER, the last writing a dissenting opinion.

This opinion denied the relevancy of *Leser v. Garnett*, saying that the law has long recognized that a private voter has a personal interest in his voting privilege by allowing him an action for damages, "private damage," against anyone who wrongfully prevents his exercising it, but that the senators exercised only a representative right, defeat of which was not a matter of private damage.]

*Second. The participation of the Lieutenant Governor.*—Petitioners contend that, in the light of the powers and duties of the Lieutenant Governor and his relation to the senate under the state constitution, as construed by the Supreme Court of the state, the Lieutenant Governor was not a part of the "legislature" so that under Article V of the Federal Constitution, he could be permitted to have a deciding vote on the ratification of the proposed amendment, when the senate was equally divided.

Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point.

*Third. The effect of the previous rejection of the amendment and of the lapse of time since its submission.*

1. The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify. The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by "Conventions" were prescribed by the Congress, a convention could not reject and, having adjourned sine die, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers, that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act "but once, either by convention or through its legislature."

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of states had already been proclaimed. The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866. New governments were erected in those States (and in others) under the direction of Congress. The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on

July 9, 1868, and that of Georgia on July 21, 1868. Ohio and New Jersey first ratified and then passed resolutions withdrawing their consent. As there were then thirty-seven states, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the States of the Union whose legislatures have ratified the fourteenth article of amendment," and in Secretary Seward's report attention was called to the action of Ohio and New Jersey. On July 20th Secretary Seward issued a proclamation reciting the ratification by twenty-eight States, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual." The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution. On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the States having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey), declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the states mentioned in the congressional resolution and adding Georgia.

Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification. While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and the previous action taken in these States was set forth in the proclamation as actual previous rejections by the respective legislatures. This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political depart-

ments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections. The statutory provision with respect to constitutional amendments is as follows:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty. See *Leser v. Garnett*, supra, p. 137.

2. The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen States and ratification by only four States, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in their administration, with the resulting competitive inequalities, continued to exist. Reference is also made to the fact that a number of the States have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view. It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937.

We have held that the Congress in proposing an amendment may fix a reasonable time for ratification. *Dillon v. Gloss*, 256 U. S. 368. There we sustained the action of the Congress in providing in the proposed Eighteenth Amendment that it should be inoperative unless ratified within seven years. No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission. But petitioners contend that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had. We are unable to agree with that contention.

It is true that in *Dillon v. Gloss* the Court said that nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some States might be separated from that in others by many years and yet be effective; that there was a strong suggestion to the contrary in that proposal and ratification were but succeeding steps in a single endeavor; that as amendments were deemed to be prompted by necessity, they should be considered and disposed of presently; and that there is a fair implication that ratification must be sufficiently contemporaneous in the required number of states to reflect the will of the people in all sections at relatively the same period; and hence that ratification must be within some reasonable time after the proposal. These considerations were cogent reasons for the decision in *Dillon v. Gloss* that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications. That question was not involved in *Dillon v. Gloss* and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioner's counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that "the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration." That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority

to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts. \* \* \*

The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion.

Affirmed.

Concurring opinion by MR. JUSTICE BLACK, in which MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join.

Although, for reasons to be stated by MR. JUSTICE FRANKFURTER, we believe this cause should be dismissed, the ruling of the Court just announced removes from the case the question of petitioners' standing to sue. Under the compulsion of that ruling, MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and I have participated in the discussion of other questions considered by the Court and we concur in the result reached, but for somewhat different reasons.

The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the states has taken place "is conclusive upon the courts." In the exercise of that power, Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, call for decisions by a "political department" of questions of a type which this Court has fre-

quently designated "political." And decision of a "political question" by the "political department" to which the Constitution has committed it "conclusively binds the judges, as well as all other officers, citizens and subjects of \* \* \* government." Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation. To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

The state court below assumed jurisdiction to determine whether the proper procedure is being followed between submission and final adoption. However, it is apparent that judicial review of or pronouncements upon a supposed limitation of a "reasonable time" within which Congress may accept ratification; as to whether duly authorized state officials have proceeded properly in ratifying or voting for ratification; or whether a State may reverse its action once taken upon a proposed amendment; and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.

The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. There is no disapproval of the conclusion arrived at in *Dillon v. Gloss*, that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a "reasonable time." Nor does the Court now disapprove its prior assumption of power to make such a pronouncement. And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to decide the "political questions" of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an "unreasonable" time has elapsed. No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as *Dillon v. Gloss* attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. If Congressional determination that an amendment has been completed and become a part of the Constitution is final and removed from examination by the courts, as the Court's present opinion recognizes, surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save the Congress, the body having exclusive power to make that final determination.

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.

[MR. JUSTICE BUTLER in a dissenting opinion said: "Upon the reasoning of our opinion in that case [*Dillon v. Gloss*], I would hold that more than a reasonable time had elapsed and that the judgment of the Kansas Supreme Court should be reversed. \* \* \* As the Court, in the *Dillon* case, did directly decide upon the reasonableness of the seven years fixed by the Congress, it ought not now, without hearing argument upon the point, hold itself to lack power to decide whether more than thirteen years between proposal by Congress and attempted ratification by Kansas is reasonable." MR. JUSTICE McREYNOLDS joined in this opinion.]

#### NOTE

1. *Chandler v. Wise*, 307 U. S. 474, 83 L. ed. 1407, 59 Sup. Ct. 992 (1939) dealt with questions similar to those in *Coleman v. Miller*, involving the validity of the ratification of the Child Labor Amendment by Kentucky, the Court of Appeals of that State having held it invalid. But the Supreme Court held that after the Governor "had forwarded the certification of the ratification of the Amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination." Mr. Justice Black and Mr. Justice Douglas, concurring, referred to the opinion by the former in the *Coleman* case, adding: "We do not believe that state or federal courts have any jurisdiction to interfere with the amending process." Justices McReynolds and Butler were in favor of affirming the Kentucky judgment on the authority of *Dillon v. Gloss*.

# CONSTITUTION OF THE UNITED STATES OF AMERICA<sup>1</sup>

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WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE. I.

SECTION: 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

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<sup>1</sup> The draft of the Constitution was submitted to Congress on Sept. 17, 1787 and by Congress to the states on Sept. 28, 1787. The ninth state ratified on June 21, 1788. The Constitution went into effect on March 4, 1789.

The text followed is that appearing in the United States Code.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the expiration of the fourth Year, and of the third Class at the expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for

any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United

States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE. II.

SECTION. I. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

#### ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the

Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

#### ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CON- GRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITU- TION.

#### ARTICLE [I.]<sup>a</sup>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### ARTICLE [II.]

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

#### ARTICLE [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

<sup>a</sup> The first ten amendments were proposed by Congress on Sept. 25, 1789 and ratified by sufficient states by Dec. 15, 1791.

## ARTICLE [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## ARTICLE [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

## ARTICLE [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## ARTICLE [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## ARTICLE [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI.]<sup>a</sup>

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

<sup>a</sup> Proposed Sept. 5, 1794, and declared ratified Jan. 8, 1798.

[ARTICLE XII.]<sup>4</sup>

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.——The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.<sup>5</sup>

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.<sup>6</sup>

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State,

<sup>4</sup> Proposed Dec. 12, 1803, and declared ratified Sept. 25, 1804.

<sup>5</sup> Proposed Feb. 1, 1865, and declared ratified Dec. 18, 1865.

<sup>6</sup> Proposed June 16, 1866, and declared ratified July 21, 1868.

or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

#### ARTICLE XV.\*

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XVI.\*

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

#### ARTICLE [XVII.]<sup>†</sup>

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

\* Proposed Feb. 27, 1869, and declared ratified March 30, 1870.

† Proposed July 12, 1909, and declared ratified Feb. 25, 1913.

‡ Proposed May 16, 1912, and declared ratified May 31, 1913.

ARTICLE [XVIII.]<sup>10</sup>

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE [XIX.]<sup>11</sup>

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XX.]<sup>12</sup>

SECTION 1. The terms of the President and Vice President shall end, at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

<sup>10</sup> Proposed Dec. 3, 1917, and declared ratified Jan. 29, 1919.

<sup>11</sup> Proposed May 19, 1919, and declared ratified Aug. 26, 1920.

<sup>12</sup> Proposed March 3, 1932, and declared ratified Feb. 6, 1933.

ARTICLE [XXI.]<sup>13</sup>

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE [XXII.]<sup>14</sup>

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

<sup>13</sup> Proposed Feb. 20, 1933, and declared ratified Dec. 5, 1933.

<sup>14</sup> Proposed March 24, 1947, and declared ratified March 1, 1951.



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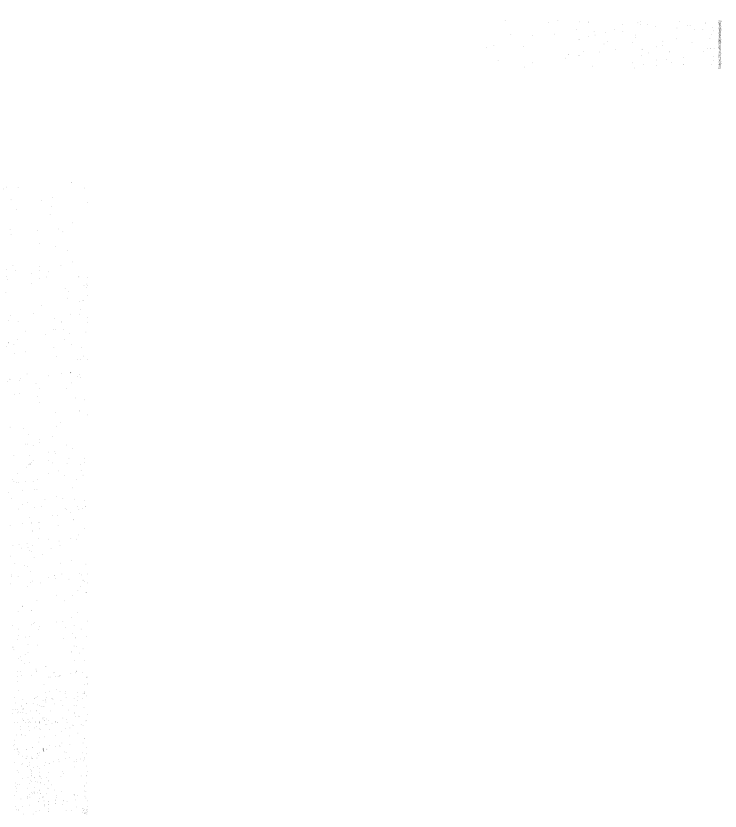
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